(25,453)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 623.

MEMPHIS STREET RAILWAY COMPANY, PETITIONER,

vs.

S. C. MOORE, ADMINISTRATOR OF THE ESTATE OF IVY B. DOUGLAS, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 11, 1917.

a United States Circuit Court of Appeals, Sixth Circuit.

No. 2842.

MEMPHIS STREET RY. CO., Plaintiff in Error,
vs.
S. C. MOORE, Adm. of the Estate of Ivy B. Douglas, Deceased, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

RECORD.

Original Transcript Filed October 11, 1915.

1 TRANSCRIPT OF RECORD.

Declaration.

Filed December 4th, 1914.

Plaintiff, S. C. Moore, a resident and citizen of Phillips county, Arkansas, and administrator of the estate of Ivy B. Douglas, deceased, whose letters of administration are here to the court shown, sues the defendants, Memphis Street Railway Company, a domestic corporation with its situs and place of business at Memphis, Shelby county, Tennessee, and the Illinois Central Railroad Company, a railroad corporation doing business in Shelby county, Tennessee, and having offices, agents, tracks, depots, etc., therein, for fifty thousand ($50,000) dollars damages by reason of the following facts, to wit:

For that, heretofore, on the 17th day of September, 1914 the defendant, Memphis Street Railway Company, was and still is a corporation engaged in the operation of street railways and electric cars in Shelby county, Tennessee, and the defendant, Illinois Central Railroad Company was, and still is a railroad corporation, owning, operating and controlling certain lines of railroad in Shelby county, Tennessee, the Raleigh Springs line of the defendant, Memphis Street Railway Company, intersecting and crossing a railroad of the defendant, Illinois Central Railroad Company, at the town of Binghampton in Shelby county, Tennessee; and for that on said date, plaintiff's intestate, Ivy B. Douglas, was a passenger on one of the defendant, Memphis Street Railway Company's east-bound cars, and when said car arrived at the intersection of the said street railway and the Illinois Central Railroad Company at Binghampton, and at or about 6:30 p. m., a collision occurred between the cars of the Memphis Street Railway Company on which plaintiff's intestate was a passenger and a freight train of the defendant, Illinois

Central Railway Company, whereby a terriffic crash and wreck occurred and whereby plaintiff's intestate was bruised, mangled, wounded, crushed, and after being caused to suffer great physical pain and mental anguish died.

Plaintiff avers that the defendant, Memphis Street Railway Company, was guilty of negligence in that its operators and employes negligently, carelessly and wantonly and recklessly caused its said car to be run upon said crossing without exercising proper precaution to ascertain whether or not a railroad train was approaching.

It was also guilty of negligence in that it having run its
2 said car upon said crossing, same was brought to a stop and thus a collision was caused.

It was also guilty of negligence in that its motorman was operating its said car over a dangerous railroad crossing without taking proper and reasonable precaution to see that said crossing was clear, and that same could be made without endangering the lives of plaintiff's intestate and other passengers.

It was also guilty of negligence in that its conductor in charge of said car signalled its motorman to proceed across said crossing in the face of a fast approaching railroad train, when he did see or by the exercise of proper care could have seen that a collision was imminent.

Plaintiff avers that the negligence of the defendant, Memphis Street Railway Company, was wilful, wanton, reckless and gross.

Plaintiff avers that the defendant, Illinois Central Railroad Company, was guilty of negligence in that it was operating its said train at such a high rate of speed through the city of Binghampton and at the crossing where the collision occurred as made its operation dangerous, hazardous and unsafe.

It was guilty of negligence in that it was operating said train without its having its engineer, fireman or other person upon the lookout ahead and in that it failed to sound its whistle, ring its bell, put on its brakes or take such other precautions as required by law to bring its said train to a stop when the collision became imminent or by the exercise of reasonable care upon its part should have been imminent.

It was guilty of negligence in that it failed to bring its said train to a full stop before proceeding to cross the railroad tracks of the defendant, Memphis Street Railway Company.

It was guilty of negligence in that it was operating its said train at said time and place without a headlight or with a headlight that was so dim as to make it hazardous and dangerous for said train to move through said city of Binghampton and over said crossing at the speed it was then moving, said collision having occurred about dark.

Plaintiff avers that the negligence of the defendant, Illinois Central Railroad Company was gross, wanton, wilful*l* and reckless.

Plaintiff avers that the negligence of the Memphis Street Rail-
way Company and the negligence of the Illinois Central
3 Railroad Company concurred in bringing about said collision and in causing plaintiff's intestate's death.

Plaintiff avers that the wanton, reckless, gross and wilful negligence of the employes of the defendants, Memphis Street Railway Company and Illinois Central Railroad Company, has been brought to the attention of the presidents and officials of said corporations and that said corporations acting through their presidents and other officials, ratified, sanctioned and approved the gross, reckless and wilful conduct of their employes and plaintiff therefore avers that because of said wanton, gross, reckless and wilful negligence, he is entitled to recover both punitive and compensatory damages.

Plaintiff's intestate left him surviving a widow, namely, Mrs. Sarah Douglass, and four small children, to wit: Lena Moore, aged twelve; Mary Frances, aged ten; Ivy, aged eight, and William, aged six; who are his sole beneficiaries and who are the beneficiaries of this suit.

Wherefore, plaintiff sues for the sum aforesaid, and demands a jury to try the issues when joined.

ANDERSON & CRABTREE,
Attorneys for Plaintiff.

Bond for Costs.

District Court of the United States, Western District of Tennessee, — Division.

Know all men by these presents, that we, F. C. Moore, Admr. Ivy B. Douglass, as principal, and M. J. Anderson and Ike W. Crabtree, as sureties, are held and firmly bound unto Memphis Street
4 Railway Company and I. C. R. R. Co. in the sum of two hundred and fifty dollars ($250.00), lawful money of the United States of America, but to be void on condition that the said F. C. Moore, administrator Ivy B. Douglass, shall prosecute with effect, an action at law which he is about to commence in the District Court of the United States for the Western District of Tennessee, at Memphis, against the said Memphis Street Railway Company, and in the event the said principal shall not pay all such costs and damages as may at any time be awarded against plaintiff, or defendant, we, the said sureties, bind ourselves, our heirs, representatives and assigns, jointly and severally, by these presents to pay all such costs, and damages as may be awarded against defendant, or plaintiff, or either of them.

Witness our hands and seals, this 4th day of December, A. D. 1914.

S. C. MOORE, *Admr.* [SEAL.]
By IKE W. CRABTREE,
MILTON J. ANDERSON. [SEAL.]
IKE W. CRABTREE. [SEAL.]

Signed, sealed and acknowledged before me, at Memphis, Tennessee, and approved by me, this 4th day of December, A. D. 1914.

[SEAL.] A. G. MATHEWS, *Clerk*,
By E. J. HEIDEL, *Chief, D. C.*

Filed December 4th, 1914. A. G. Mathews, Clerk.

Summons.

District Court of the United States, Western District of Tennessee.

The President of the United States of America—To the Marshal of the Western District of Tennessee—Greeting:

5 You are hereby commanded to summon Memphis Street Railway Company, a Tennessee corporation, and Illinois Central Railroad Company, a foreign corporation, if to be found within your District, to appear before the Judge of the District Court of the United States, in the Sixth Judicial Circuit for the Western District of Tennessee, at Memphis, Tennessee, in said District, on the fourth Monday in May next, A. D. 1915, and then and there to answer S. C. Moore, administrator of estate of Ivy B. Douglas, deceased, citizen of the State of Arkansas, in a plea of damages as set out in the declaration, a copy of which accompanies this writ, to the damage of said plaintiff (as he says) fifty thousand dollars ($50,000.00). Herein fail not, and have you then and there this writ.

Witness the Hon. John E. McCall, judge of the District Court of the United States, for the Western District of Tennessee, and the seal of said District Court, at said Memphis, this 5th day of December, A. D. 1914, and the 139th year of American Independence.

[SEAL.]

A. G. MATHEWS, *Clerk.*
By E. J. HEIDEL, *Chief D. C.*

Marshal's Return.

This writ came to hand on the date of its issuance, and I duly executed the same, as therein commanded, by making the contents thereof known to the within named defendant, Illinois Central R. R. Co., by reading to A. H. Egan, general superintendent of said company, at Memphis, Tennessee, on the 7th day of December, A. D. 1914, and at the same time and place delivering to him a duly certified copy thereof, together with such copy of the declaration of this suit; and I further executed this writ by making known the contents thereof to the defendant, Memphis Street Railway Company, by reading to T. H. Tutwiler, president of said company, at Memphis, Tennessee, on the 8th day of December, A. D. 1914, and also then and there delivering to him like copy of the same, and of said declaration.

Memphis, Tennessee, December 8th, A. D. 1914.

J. SAM JOHNSON, *U. S. Marshal,*
By S. E. MITCHELL, *Deputy.*

Returned and filed December 8th, 1914. A. G. Mathews, Clerk.

6 *Pleas of Illinois Central R. R. Co.*

Filed May 26th, 1915.

Now comes the defendant, Illinois Central Railroad Company, and for plea says:

I.

That it is not guilty of the matters and things in plaintiff's declaration alleged.

II.

And for further plea comes the Illinois Central Railroad Company, and says that the plaintiff herein, or the plaintiff's intestate has compromised and settled his right of action, if any he had, because this defendant says that the plaintiff or his intestate heretofore entered into an agreement with the Memphis Street Railway Company, by which agreement the identical cause of action herein was compromised, settled, satisfied, and discharged, and this defendant says that having so settled, satisfied, compromised and discharged his right of action with the Memphis Street Railway Company, that the plaintiff had but one right of action arising out of the injury, and is entitled only to one satisfaction thereof, and having heretofore settled said cause of action with the Memphis Street Railway Company which is the same cause of action upon which he sues this defendant, the plaintiff herein is not entitled to have and maintain this suit. And this defendant here and now pleads said settlement and satisfaction of the right of action with the Memphis Street Railway Company as a bar to his right to have and maintain this suit.

This defendant says that said release, discharge, satisfaction and settlement of said cause of action was in writing, but this defendant is unable to procure a copy thereof and does not know the amount paid plaintiff by the Memphis Street Railway Company, and is unable to ascertain this fact. But these matters will more clearly appear in the proof.

III.

And for further plea, this defendant says that the plaintiff herein, or the plaintiff's intestate, for a valuable consideration, the amount of which is to this defendant unknown, executed a covenant not to sue the Memphis Street Railway Company, and that the right of action of plaintiff herein against the Memphis Street Railway Company was identical with the right of action sued on in this case. This defendant says that said right of action for which the plaintiff herein, or his intestate, took a covenant not to sue the Memphis Street Railway Company, arose out of the very matters and
7 things alleged in plaintiff's declaration against this defendant.

This defendant says that if plaintiff has any right of action, he has but one right of action against both this defendant and the

Memphis Street Railway Company and this defendant says that having accepted a certain amount of money for and in consideration of executing a covenant not to sue the Memphis Street Railway Company that this defendant is entitled to a credit pro tanto of the right of action against this defendant, for the amount paid plaintiff herein or his intestate by the Memphis Street Railway Company and this defendant says that said amount paid the plaintiff by the Memphis Street Railway Company, which amount is unknown to this defendant, but which will be shown at the trial, should be credited pro tanto upon the right of action which the plaintiff has against this defendant, and should be credited upon whatever judgment is returned in this cause.

And this defendant here and now demands a jury to try the issues herein joined.

SIVLEY & EVANS,
Attorneys for Illinois Central Railroad Company.

Pleas of Memphis Street Railway Company.

Filed May 26th, 1915.

Now comes the defendant, The Memphis Street Railway Company, and, for plea to the declaration heretofore filed herein, says:

I.

That it is not guilty of the wrongs and injuries in said declaration alleged.

II.

That the wrongs and injuries in said declaration alleged were due to and approximately contributed to by the want of ordinary care upon the part of decedent herein; and this it is ready to verify.

Defendant demands a jury to try the issues joined.

WRIGHT, MILES, WARING & WALKER,
Attorneys for Defendant.

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Replication of Plaintiff.

Filed May 28th, 1915.

Comes the plaintiff and for replication to the plea interposed by the defendants herein says that he joins issue thereon.

ANDERSON & CRABTREE,
Attorneys for Plaintiff.

Pleas of Memphis Street Railway Company.

Filed June 16th, 1915.

Now comes the defendant, The Memphis Street Railway Company, and for further plea says:

I.

That the plaintiff herein, or the plaintiff's intestate has compromised and settled his right of action, if any he had, because this defendant says that the plaintiff or his intestate heretofore entered into an agreement with the Illinois Central Railroad Company, by which agreement the identical cause of action herein was compromised, settled, satisfied and discharged, and this defendant says that having so settled, satisfied, compromised and discharged his right of action with the Illinois Central Railroad Company, that the plaintiff has but one right of action arising out of the injury, and is entitled only to one satisfaction thereof, and having heretofore settled said cause of action with the Illinois Central Railroad Company which is the same cause of action upon which he sues this defendant, the plaintiff herein is not entitled to have and maintain this suit. And this defendant here and now pleads said settlement and satisfaction of the right of action with the Illinois Central Railroad Company as a bar to his right to have and maintain this suit.

This defendant says that said release, discharge, satisfaction and settlement of said cause of action was in writing, but this defendant is unable to procure a copy thereof and does not know the
9 amount paid plaintiff by the Illinois Central Railroad Company, and is unable to ascertain this fact. But these matters will more clearly appear in the proof.

II.

And for further plea, this defendant says that the plaintiff herein, or the plaintiff's intestate, for a valuable consideration, the amount of which is to this defendant unknown, executed a covenant not to sue the Illinois Central Railroad Company, and that the right of action of plaintiff herein as against the Illinois Central Railroad Company was identical with the right of action sued on in this case. This defendant says that said right of action for which the plaintiff herein, or his intestate, took a covenant not to sue the Illinois Central Railroad Company arose out of the very matters and things alleged in plaintiff's declaration against this defendant. This defendant says that if plaintiff has any right of action, he has but one right of action against both this defendant and the Illinois Central Railroad Company, and this defendant says that having accepted a certain amount of money for and in consideration of executing a covenant not to sue the Illinois Central Railroad Company that this defendant is entitled to a credit pro tanto of the right of action against this

defendant, for the amount paid plaintiff herein or his intestate by the Illinois Central Railroad Company, which amount is unknown to this defendant, but which will be shown at the trial, should be credited pro tanta upon the right of action which the plaintiff has against this defendant, and should be credited upon whatever judgment is returned in this cause.

And this defendant here and now demands a jury to try the issues herein joined.

ROANE WARING,
Attorney for Defendant.

For replication, plaintiff joins issue upon this plea.

ANDERSON & CRABTREE,
Attorneys.

10 *Plea of Memphis Street Railway Co. as to Jurisdiction.*

Filed June 16th, 1915.

Now comes the defendant The Memphis Street Railway Company and for further plea to the declaration heretofore filed in this cause, says that the plaintiff is the administrator of the estate of Ivy Douglass by virtue of appointment from the Probate Court of Shelby county, Tennessee, and for all purposes in connection with the administration of that estate he is a citizen of the State of Tennessee. and that the defendant The Memphis Street Railway Company is a corporation chartered under the law of the State of Tennessee and therefore there is no diverse citizenship as would give the plaintiff the right to institute a suit in this court, and this it is ready to verify.

ROANE WARING,
Attorney for Defendant The Memphis Street Railway Company.

Roane Waring makes oath that he is attorney for The Memphis Street Railway Company and says upon oath that the matters and things stated in the foregoing plea are true in substance and in fact, and that the said plea is not interposed for delay.

ROANE WARING.

Subscribed and sworn to before me this sixteenth day June, 1915.

[SEAL.] E. J. HEIDEL,
Chief Deputy Clerk.

Jury Card.

Filed June 17th, 1915.

We, the jury for our verdict say we find the issues joined in this case in favor of:

The plaintiff, and fix the damages at $25,000.00.

H. C. WILSON, *Foreman.*

Dated June 17th, 1915.

11 *Bill of Exceptions.*

Filed July 19, 1915.

Be it remembered that this cause came on for trial on the sixteenth day of June, 1915, in the District Court of the United States for the Western Division of the Western District of Tennessee, before the Honorable John E. McCall, and a jury, when the following proceedings were had and evidence heard, to-wit:

Appearances:

Messrs. Milton J. Anderson and Ike W. Crabtree, Attorneys for the Plaintiff.
Mr. Roane Waring, Attorney for the Defendant.

The court inquired of counsel representing the parties if the above suit was the result of the same accident out of which grew the suit of Moore, Admr., vs. The Memphis Street Railway Company, et al., both suits having previously, at the call of the calendar, been set for trial on the same day, to wit, June 16th, 1915, to which counsel replied in the affirmative. The court then inquired if there was any reason why the two suits should not be tried together before the same jury; to which inquiry, counsel for both parties answered that they objected to such a course; over this objection of counsel for plaintiff and defendant, the court directed that the cases be tried together before the same jury, to which counsel for both plaintiff and defendant excepted. Thereupon, The Memphis Street Railway Company, through its counsel, asked for permission to file an additional plea to the jurisdiction of the court to try the case of Moore, administrator, against the Memphis Street Railway Company, this was allowed, but the plea was overruled. Thereupon, a jury was called to the box, and the jury in the case was duly and regularly impaneled and sworn to try, at the same time, this case and the case of Moore, Admr., versus The Memphis Street Railway Company, et al., and the trial of both cases were begun when the following proceedings were had therein before the court and jury, to-wit: Counsel for plaintiff asked leave to take a non-suit as to the Illinois Central Railroad Company in both cases, which was allowed.

Thereupon, witnesses were sworn, and plaintiff, in order to sustain the issues in the case, offered the following evidence:

Mr. S. C. Moore, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

12 Direct examination.

By Mr. Anderson:

Q. Mr. Moore, it has already been admitted by counsel for the defendant that Mr. Iva B. Douglass was a passenger on a car of the Memphis Street Railway Company, and, while a passenger on that

car was killed on the seventeenth of September, 1914. Did you know Mr. Iva B. Douglass in his lifetime?

A. Yes, sir.

Q. Are you related to him in any way?

A. Yes, sir.

Q. In what way?

A. Brother to my wife.

Q. You are his brother-in-law?

A. Yes, sir.

Q. Your name is S. C. Moore, is it?

A. Yes, sir.

Q. Did you take out letters of administration on the estate of Iva B. Douglass, deceased?

A. Yes, sir.

Q. I hand you these letters and ask you——

The Court: Is there any question about his administration?

Mr. Waring: I want the record to show it.

Mr. Anderson:

Q. Are these your letters of administration?

A. Yes, sir.

Mr. Anderson: I ask you to file these, introduce them and make them Exhibit "A" to Mr. Moore's deposition.

Said letters so introduced and filed are in the words and figures as follows, to wit:

Letters of Administration.

STATE OF TENNESSEE,
Shelby County:

To S. C. Moore, a citizen of Phillips Co., Ark.:

It appearing to the Probate Court, now in session, that Ivy B. Douglass, has died, leaving no will, and the court being satisfied as to your claim to the administration, and you, having given bond and qualified as directed by law, and the court having ordered that letters of administration be issued to you.

These are, therefore, to authorize and empower you to take into your possession and control, all the goods, chattels, claims and papers of the said intestate, and return a true and perfect inventory thereof to our next Probate Court; to collect and pay all debts, and to do and transact all the duties in relation to said estate, which lawfully devolves on you as administrator, and, after having settled
13 up said estate, to deliver the residue thereof to those who are by law entitled.

Witness J. C. McLemore, clerk of said court, at office, this first day of December, 1914, and the 139th year of American independence.

[SEAL.]

J. C. McLEMORE, *Clerk.*
By E. B. CRENSHAW, *D. C.*

Q. Mr. Moore, where do you live?
A. Helena, Arkansas.
Q. How long have you been a resident of Helena, Arkansas?
A. About sixty-six years.
Q. And you are a citizen of Arkansas?
A. Yes, sir.

The Court: Certainly would be after he had been there sixty-six years.

Mr. Anderson:

Q. Mr. Moore, who did Mr. Douglass leave surviving him?
A. Left a widow and four children; four small children.
Q. Will you give the name of the widow and the names of the four children and their ages?
A. Mrs. Sarah Douglass, the widow; I don't know her age.
Q. This is Mrs. Sarah Douglass here (indicating)?
A. Yes, sir. Lena Douglass, twelve; Mary Douglass, ten; Allison Douglass, eight; Willie Douglass, six.
Q. And those are the four children there (indicating)?
A. Yes, sir.
Q. How old was Mr. Douglass at the time he was killed?
A. Forty-two.

Cross-examination.

By Mr. Waring:

Q. Mr. Moore, Mr. Douglass lived in Shelby county, Tennessee, did he not?
A. At the time of his death; yes, sir.
Q. And you qualified as administrator of his estate in this county?
A. Yes, sir.
Q. Now, he had no estate and left no estate in Arkansas?
A. No, sir.
Q. And the only estate he left at all was in Shelby Co., Tenn.?
A. Yes, sir.
Q. He was a resident of Shelby county, Tennessee, at the time he died?
A. Yes, sir.
14 Q. The widow and the heirs for whose benefit this suit is brought live in this county, do they not?
A. Yes; that is their permanent home. There is two of the children living with me.
Q. But their residence is really in this county, just living with you temporarily?
A. Yes, sir.

Mr. Waring: That is all.
Witness excused.

Mr. NORMAN SILBERBERG, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Please state your name to the court and jury?
A. Norman B. Silberberg.
Q. In what business are you engaegd?
A. In the house furnishing and chinaware business.
Q. With what concern?
A. B. Lowenstein Bros.
Q. Are you the head of that department at B. Lowenstein Bros.?
A. Yes, sir.
Q. Did you know Mr. Iva B. Douglass in his lifetime?
A. Yes, sir.
Q. Do you recall the occasion of him being killed in September of last year?
A. Yes, sir.
Q. Who was he working for at the time that he was killed?
A. B. Lowenstein Bros.
Q. And who was his immediate superior?
A. I was.
Q. In other words, you had charge of the department in which he worked?
A. Yes, sir.
Q. How long had he been working for you or for B. Lowenstein & Company in that department?
A. About a year or a little over.
Q. Please tell the court and jury what was his habits of industry and what kind of a man he was as to work and industry?
A. Well, he was a very conscientious man for one thing and was always there and attended to his duties as well as could be expected of him.
Q. What salary was he getting at the time of his death?
15 A. If I remember right——

Mr. Waring: Now, wait a minute, not if he remembers right. The books wil- show what salary he made.

The Court: Did you know what he was being paid?
A. I don't remember exactly. I think I can tell you though.
The Court: Did you contract with him?
A. No, sir.
The Court: Or in his presence when the contract was made?
A. At his first salary, yes; but not the second; I know he got a raise.
The Court: What was he getting as first salary?
A. $40.00.
Mr. Waring: $40.00?
A. Yes, sir.
Mr. Waring: You mean $40.00 a month?

A. And he was raised $10.00 a month.

The Court: He says $40.00 and was afterwards raised to $50.00.

Mr. Anderson:

Q. Then was it raised again from $50.00 to $60.00?
A. That I could not say. I left myself at the time for New York and it was left with Mr. Gruver.
Q. Who does know over there? Mr. Elias Lowenstein has been subpœnaed here. Would he know?
A. I hardly think he would.
Q. Will you go to the books at the noon hour and ascertain——

Mr. Waring: I think Mr. Loeb could tell you.
Mr. Anderson: Mr. Loeb is not under subpœna.

Q. Will you go to the books at the noon hour and ascertain as a fact what he was earning at the time of his death and report back here at two o'clock?
A. Yes, sir.
Q. Mr. Silberberg, I will ask you whether or not at the time of his death there were prospects of him obtaining any further raise; just tell the court and jury what you know about it?

Mr. Waring: Wait a minute. That is objected to as speculative.
The Court: Yes, I don't think he can state any prospect of future raises. He can state the man's acquirements and desirability as an employe and efficiency as a clerk there.
Mr. Anderson: Will your Honor let me say this, here is a man that was his immediate superior, and if he can testify this
16 man was doing his work so well, was conscientious, that he was going to get another raise in the future and it had been contemplated I think that should go to the jury for what it is worth in showing what kind of man he was.
The Court: He states what kind of a man he was. I don't think you need to go into that. He might or might not have gotten an advance in wages, as you know.

Mr. Anderson:

Q. Well, can you state whether or not he had gotten one or two raises during the time he worked there?

Mr. Waring: He has stated.
The Court: Yes, I think he has, too.
Mr. Anderson: Does your Honor hold that I can not ask that?
The Court: If you don't know what he said you can ask the question.

Mr. Anderson:

Q. Will you please tell the court and jury whether you know or not it was contemplated to give him another raise in a short time?

Mr. Waring: That is objected to.
The Court: That is a different question entirely. I stated he

might tell you if you did not know whether he had received one or two advances since he went to B. Lowenstein.

Mr. Anderson: I did not understand your Honor then about that.

Q. Had he received one or two advances in salary from the time he went to work at B. Lowenstein's?

A. Well, to my knowledge I only remember one.

Mr. Anderson: That is all.

The Court: Anything Colonel?

Mr. Waring: No I don't want to ask him anything.

Witness excused.

Mrs. FINLEY FAXON, a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Is this Mrs. Finley Faxon?

A. Yes.

Q. Mrs. Faxon, were you a passenger on a car of the Memphis Street Railway Company in September of last year when the collision took place out there between that car and a train of the Illinois Central Railroad Company?

A. Yes.

17 Q. Will you please go ahead and in your own way tell what took place in that collision; just describe the matter fully to these gentlemen?

A. As I saw it?

Q. Yes ma'am?

A. Well, I was on the train, I mean on the car, on the south side of the car, and when the car came to the track, to the I. C. tracks, why we slowed down and stopped but we went very close to the train. There was a train going south at the time, a freight train, a very long freight train, and it was going rapidly. I remember I was made very nervous then because we went so close to that train, and I looked out the window and saw another train coming. I saw it at a great distance. I say I saw the train, I mean I saw the smoke stock of the train, and naturally that made me quite nervous to see it coming, but the car that was passing was going at such a rapid rate—the train that was passing was going at such a rapid rate I thought that would clear before the other train came, but this train that was coming, the one that was going north, was also going at a very rapid rate, and I began to feel very nervous—naturally I would—and I controlled myself. I know I had one impulse to go and tell them that that train was coming.

Q. That that train was coming?

A. That that train was coming, yes. And then I heard this train that was coming whistle and I saw the smoke from the whistle. Then I calmed myself for I thought that if I heard it that the conductor would certainly hear it as it was his business to watch such

things, and in that way I kept my seat, but just after this train that was passing——

Q. Going south?

A. Going south. After that cleared I saw the motorman start up the car and I realized then that there was going to be a terrible accident. I got up and went to the front of the car—I don't mean to the front, about two seats on the other side, where my child was, my little child was. My only thought was to protect her in any way I could. My brother had this child in his lap. I told him that we were going to be killed, and by that time there was a great deal of excitement, people jumped up. He told me to take his seat, and to be quiet, which I did. Our car slowed down—I think he turned off the power when he saw it when the people began screaming—I mean the conductor——

Q. You mean the motorman?

18 A. Yes, the motorman. He turned off his power and the people, I remember they hollered to go on "we will make it, go ahead." Then he put his power on again. We cleared but they struck the trailer.

Q. Struck the trailer. As I understand you, Mrs. Faxon, you were a passenger on the motor car?

A. On the motor.

Q. Of the Street Car Company, and that motor car was drawing a trailer car?

A. Yes.

Q. And at this crossing out there there are two tracks of the Illinois Central Railroad Company?

A. Yes.

Q. And the train that was the closest was on the west track and that was the one that was going south, the train was going south on the west track?

A. Yes.

Q. And the train that you saw off while it was passing, that you saw coming at a great distance, saw the smoke from the smoke stock, and that you afterwards heard blow and saw the smoke from the whistle, it was coming on the east track and coming north?

A. Yes.

Q. And that was the one that struck the Street Car Company's cars?

A. It was.

Q. Now you say that the motorman started across and the passengers began to yell, began to holler?

A. Yes.

Q. And then he stopped, and then they hollered again. How was that? I did not exactly catch that?

A. I think I was the first one up in the car, and I suppose the other passengers heard me when I told my brother that we were going to be killed. I told him there was another train coming and that we would be killed, then just pandemonium.

Q. The motorman had then started when the passengers hollered?

A. Yes. I did not get up until the motorman started.

Q. He started and then the passengers began to holler?
A. Yes.
Q. And he continued for about how far before he stopped again?
A. Why, really I don't know, I don't know the distance we traveled then.
Q. When the Illinois Central train, that freight train that was going north, struck your car, struck the street car, was the street car standing still then or moving?
19 A. When it struck the trailer?
Q. Yes, ma'am?
A. Why, I don't remember. I remember I was so relieved that we had gotten across, but then I thought of the trailer. I suppose we stopped when it struck, I don't know that.
Q. Mrs. Faxon, when you were sitting in that motor car looking south out of the window, how far off could you see the smoke stack, the smoke and the smoke stack of that engine that was coming on the other track?
A. Well, I can't testify as to the distance except that it was a great ways off.
Q. And at that time the street car was standing still?
A. At a stand still.

The Court: She has been all over that, Mr. Anderson. No need of having those things repeated. The jury and the court catch it.
Mr. Anderson: Yes, sir.

Q. Did you see what the conductor did?
A. No, sir.
Q. Do you know whether or not the conductor was on or off of the car?

Mr. Waring: She said she did not see him.

A. Well, he was off the car, because I remember thinking he would signal, so he must have gone forward.

Cross-examination.

By Mr. Waring:

Q. Mrs. Faxon, you were on the motor car, were you not?
A. I was on the motor car.
Q. Back near the rea rend of the motor car?
A. Well, toward the end, in the middle, toward the back.
Q. About in the middle, yes ma'am. Now, this train of cars was a motor car and a trailer, was it not?
A. Yes, sir.
Q. And this train of cars came up there and stopped at the railroad crossing?
A. It did.

Cross-examination:

Q. And you say you know the conductor got off to flag the crossing?
A. Yes.

Q. Now, when they got there though there was a very long Illinois Central train moving south across the crossing, was it not?

A. Yes, sir.

20 Q. An unusually long train?

A. Quite a long train. I didn't count the cars. I know it was a long train.

Q. But the car ran up and stopped and this train was passing right in front of it?

A. Ran quite close.

Q. Now, it was making considerable noise, was it not?

A. It was.

Q. As it bumped across the crossing there?

A. Unusual amount of noise.

Q. Do you recall smoke around there from the engine as it passed, smoke and dust as it made the crossing there?

A. That did not impress me.

Q. That did not impress you. From where you were back in the car, seated back in the middle of that car, you would of course be higher than a person standing on the ground would have been, were you not?

A. Yes, sir.

Q. And from where you were back in the car you say you looked down and a great distance away you saw a smoke stack of an engine coming in the opposite direction from which that southbound train was going?

A. Yes, saw it over the top of the cars.

Q. Did you see the smoke from where you were sitting now on this street car—of course the train that was coming north, that you saw coming north, was on the other side of this southbound train from you, was it not?

A. Yes, sir.

Q. Now, could you see the smoke stack over those cars, of could you just see smoke that indicated a train coming?

A. I remember that I saw the smoke stack. Whether I first saw the smoke and then the stack I could not say.

Q. But it was a great distance away?

A. Yes, sir.

Q. You say it was coming at a very rapid rate?

A. Yes.

Q. And when this southbound train cleared the crossing the street car started on across and that is when you jumped up as I understand?

A. When I realized that we were going to start.

Q. Now then, when it got there on the track as it went on the crossing and this other train coming of course there was a good deal of excitement on the car at that time?

A. Not until I jumped up.

21 Q. I mean when you jumped up. So far as you know you were the only one saw the train coming, were you not?

A. I suppose so, I was the first one up.

Q. You jumped up and screamed, and at that time the street car was then moving of course?

A. I don't remember screaming.

Q. Ma'am?

A. I don't remember screaming.

Q. You called people's attention to the fact, did you not?

A. I told my brother.

Q. You say some people hollered to stop and some hollered to go ahead?

A. Why, I don't remember them telling him to stop. I think he did that just when he realized it, he turned his power off. I don't know that we came to a stand still, but I know he turned his power off and the car hesitated, and the people told him to go forward, he would make it, and he did so.

Q. And then he went forward and before the entire car cleared it struck the trailer?

A. Our car did.

Q. Your car did, but before the entire train cleared it struck the trailer?

A. Yes.

Q. The Illinois Central train when you got clear of the south-bound track, how close was the Illinois Central train then to the car, this engine?

A. I could not say how close, but I thought it would strike us. It just did miss us. It was close enough for us to just miss it.

Q. It was practically on you at that time?

A. Yes, sir.

Q. Did you notice any checking of the speed of the engine?

A. When I stood up I had my face the other way towards my child.

Redirect examination.

By Mr. Anderson:

Q. Mrs. Faxon, the car had already started up and was on the track when the passengers told him to go ahead he could make it, when he hesitated?

A. We were on the track.

Q. It was on the track then when the passengers hollered "Go ahead, you can make it?"

A. When I first heard them say that we were on the track. I should think there or about there.

22 Witness excused.

Recess until two p. m.

Mr. P. H. GIDEON, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Please state your name to the court and jury?
A. P. H. Gideon.
Q. Mr. Gideon, in what business are you engaged?
A. Cashier, New York Life.
Q. Have you with you the American Mortality tables?
A. Yes, sir.
Q. Will you please state what is the life expectancy of a man that is forty-two years of age?
A. Twenty-six.
Q. Twenty-six even?
A. 26.72.
Q. 26.72 years?

Mr. Anderson: We have not proved Mr. Corey's age yet, but I understand it to be 51 or 52. While this witness is on the stand, with Mr. Waring's consent, I would like to ask you the life expectancy of a man 51 or 52 years of age?
A. 51 is twenty years and 20/100.
Q. Fifty-two years?
A. Nineteen years and 49/100.

Cross examination.

By Mr. Waring:

Q. Mr. Gideon, that of course don't mean a man is going to live that long, anything like that?

Mr. Anderson: I object to that, may it please the court, about that don't mean he is going to live that long. That is not proper examination. Your Honor, when you come to charge the jury will tell them they are not to take that as the absolute measure.

The Court: Well, I will instruct the jury now that a man's expectancy does not mean that he will live that number of years if nothing happened to him. It just means by the actuary's tables they have discovered for life insurance purposes that a man of a given age has a prospect of living so many years in the ordinary run of affairs.

Mr. Waring: A man of ordinary health.

The Court: A man of ordinary health, and he might live longer and he might live a shorter time as the circumstances would afford. It is only a circumstance for your consideration, that is all.

23 Mr. Waring: That is all I want to ask him.

Witness excused.

Mr. Anderson: Mr. Silberberg has reported to me that Mr. Douglass's salary at this time was $50.00 a month, so I will just ask the marshal to tell him that he can go.

The Court: That is what he stated?
Mr. Anderson: That is what he stated.

Mr. L. P. ZIMMERMAN, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By. Mr. Anderson:

Q. Have you been sworn?
A. Yes, sir.
Q. Please state your name to the court and jury?
A. L. P. Zimmerman.
Q. Mr. Zimmerman, in what business are you engaged?
A. Why, I am fixing to go in business for myself at the present time. I have been salesman.
Q. Mr. Zimmerman, were you a passenger on a car of the Memphis Street Railway Company on September 17th of last year when a collision took place out there between that car and a train of the Illinois Central Railroad Company?
A. Yes, sir.
Q. Were there any people killed in that accident?
A. Several.
Q. About what time in the day did that accident happen?
A. Well, it was late in the afternoon.
Q. Just about what time?
A. I don't remember the exact time, but I think it was the car—let me see—I believe it was the car that left town at six o'clock.
Q. About how long does it take the car to run from town out to this place?
A. About thirty-two minutes.
Q. Then you would estimate it would be about 6:30 that this accident happened?
A. About that, as I remember that.
Q. Whereabouts were you riding in that car?
A. I was on the south side of the car, next to the last cross seat.
Q. Is that the motor car?
A. Yes, sir.
Q. And it was drawing a trailer?
A. Yes, sir.
24 Q. Now, Mr. Zimmerman, will you just go ahead and in your own way tell these gentlemen so they can understand it distinctly and hear you everything that took place as that car approached that crossing, what the motorman did, what the conductor did, and what you saw, tell them everything in your own way?
A. Well, I was sitting on the south side of the car facing—of course the car was going east and threw me looking towards the south and the east. At the time that the car pulled up to the railroad crossing there was a train going south on the first track, or the west track, and I was sitting there watching that train and just idly counting the cars, and I looked down and I saw a train coming from

the opposite direction. I could see the smoke of the engine over the other train, and I saw that the distance it was and the speed it was coming and all, and I looked back again to the other side, to the north, to see how much longer that southbound train was. I was thinking and hoping to goodness that northbound train gets to the crossing before this southbound train gets by because if they don't there is liable to be trouble here. I watched these cars and all and as soon as the southbound train got out of the way—I saw it was going to get out of the way first, and the conductor was standing there at the front end of the car, and I raised up in my seat and looked out of the window, and he started across the track, and to all appearances, if he moved his head one way or the other I could not see it. He waived ahead, he made some kind of signal. I could not see just what kind of signal he made because the left side was cut off by my view of the car.

Mr. Waring: I object to the witness stating that he made a signal if he did not see anything.

The Court: Did you see whether he made the signal or not?

A. No, sir; I could not see the signal he made. He was supposed to make a signal.

The Court: Never mind what you suppose.

A. Anyhow the motorman started the car and I saw that the crash was imminent, was not a chance for him to get across, and I and several others hollered for him not to try to make it, but he went right ahead and got part of the way across, people yelling and screaming in the car, the people became frightened, so the motorman just slackened the speed a bit and then went ahead trying to get across, but the oncoming train struck the trailer just about the center as near as I could judge.

25 Q. Well, when it struck the trailer what did it do?

A. Carried it down to that second telegraph post, I don't know how far it is, carried it down there.

(By Mr. Waring:)

Q. Carried it down to the second what?

A. Second telegraph post it looked like to me, I don't know what it was.

Q. When you were sitting there on the south side of this motor car looking south, how far back was it you saw this northbound train?

A. When I first saw it?

Q. Yes.

A. Well, I don't know the exact distance. I could not tell you. It was below, just about beyond that switch that goes into Powell & Graham's there.

Q. Will you give these gentlemen an idea about how far that is in feet and yards?

A. Well, I reckon it must have been when I first saw the train about 500 feet I guess, or something like that.

Q. And the street car was then standing still?
A. Was standing still, yes, sir, maybe a little further.
Q. Did you hear any alarm sounded by the train?
A. Yes, sir, heard the whistle.
Q. How many times did that train whistle?
A. I could not say positively.
Q. But you did hear it whistle?
A. I heard it whistle, yes, sir.
Q. Did you observe—after the southbound train passed did you observe the northbound train as to whether or not there was any headlight?
A. Yes, sir, the headlight was burning.
Q. The headlight was burning?
Q. Yes, sir, it was not dark yet but the headlight was burning.
Q. Now, when the southbound train cleared the north-bound track how far was it south of the crossing where the collision took place?
A. Just about that dirt road or a little beyond.
Q. You mean Broad Street?
A. Yes, sir.
Q. And Broad street is south of this crossing?
A. South of the car line crossing.
Q. South of the car line, and Broad street is about how far from that car line?
A. I don't know, it is I judge about 100 to 150 feet. The train was maybe fifty feet beyond, say about 200 feet as near as I could judge.
Q. You say that you hollered and several other passengers
26 hollered to the motorman not to start?
A. Yes, sir.
Q. Do you know about how many hollered out?
A. No, I could not say. There was a great deal of confusion in the car.
Q. A great deal of confusion?
A. Yes, sir, just as soon as we began hollering for him not to try to make it pandemonium reigned you might say, everybody began to get excited right away.
Q. There were many others besides you that knew the train was coming?

Mr. Waring: I object to that.

A. I don't know how many.

The Court: Don't lead the witness.

Mr. Anderson:

Q. Well, were there many others besides you hollered for him not to start?
A. There were some, I don't know how many.
Q. You stated that the whistle was blown. Do you know whether the bell as ringing or not?
A. I would not state positively about that. I don't remember, but I think it was; I could not state positively.

Cross-examination.

By Mr. Waring:

Q. Mr. Zimmerman, the car was under way when you all hollered out to stop, was it not?

A. It was under way.

Q. Yes, it had started?

A. I think not. I won't say whether he was just in the act of starting, or whether he had started, but I think we called to him, at least I called just about the time he started.

Q. Didn't you testify in the trial of the Bobo case here last term of the court that the car was under way on the first set of tracks; that the people hollered "Stop, go ahead" and pandemonium broke out?

A. I don't remember exactly about that. I would not say positively, but my best recollection is——

Q. You would not have thought if he was not under way there was any reason for them to holler not to start?

The Court: Don't argue with the witness.

Mr. Waring: I am not arguing, just trying to pin him down.

A. Of course they would not have hollered if he had not made some move, but I don't know just how far he had gone.

Q. You say you know this train whistled?

A. Yes, sir.

27 Q. How do you know it was this train instead of the southbound?

A. Oh, the southbound engine was so far away it would not have sounded that distinct.

Q. The whistle you heard then was practically on you, wasn't it?

A. Yes, sir.

Q. And the southbound train was passing, passing very rapidly, wasn't it?

A. I don't know what speed it was passing, yes, going pretty good speed.

Q. Pretty good speed?

A. Yes, sir.

Q. You were sitting whereabouts in the car?

A. On the south side of the car next to the last cross seat, next to the window.

Q. Where was the conductor the last time you saw him?

A. The last time I saw him—let me see—why, the conductor, I saw the conductor after the train hit the car.

Q. I am talking about before the accident happened?

A. Oh, he was crossing the tracks.

Q. The car ran up there and stopped, did it not?

A. Yes, sir.

Q. And the southbound train passed?

A. Yes, sir.

Q. And the car stood there until the southbound train got by?

A. Yes, sir.

Q. And the conductor got off, as it was his place to do, to flag those crossings?

A. He was already off and standing there by the car.

Q. I say when the car rolled up there and stopped he got off?

A. Yes, sir.

Q. You stood there and let the southbound train go by?

A. Yes, sir.

Q. After that the conductor started on across for the purpose of flagging, did he not?

A. Yes, sir.

Q. The last time you saw him where was he, when he started across to flag?

A. Well, as well as I can remember he was practically across the tracks.

Q. He had gone practically across the tracks?

A. Yes, sir.

Q. Across the first set of tracks or second set?

A. Oh, probably across the second set.

28 Q. The second set of tracks was the track the northbound train was coming on?

A. Yes, sir.

Q. After he got across there you don't know whether he signaled or not?

A. I could not say what signal he made.

Q. But after he got across there the car started ahead?

A. Yes, sir. If he signaled first, that is he signaled with his left hand, that was excluded from my vision.

Q. But when the car started across—well, I will ask you this first: when you first saw this train now it was you say about 500 feet away from the crossing?

A. As near as I could judge.

Q. Down about that switch?

A. Down about that switch somewhere, maybe a little closer, but I think that is about it.

Q. Approximately 200 feet from the crossing?

A. Yes, sir.

Q. Now, when that was down there this southbound train was still passing, was it not?

A. Yes, sir.

Q. And you looked back to see how many more cars were coming from the southbound train?

A. Yes, sir.

Q. To sort of estimate whether this northbound train would get there first or not?

A. Yes, that is exactly it.

Q. As you stood there these cars kept going?

A. Yes, sir.

Q. Of course the northbound train was still approaching?

A. Yes, sir.

Q. When you got out where you could see the northbound train was somewhere about Broad street?

A. Just about there.

Q. You noticed a cloud of dust and smoke around that crossing, did you not?

A. Well, there was some dust. Of course the southbound train would kick up some dust, didn't it?

Q. There was some smoke there?

A. I didn't say that.

Q. I didn't ask you that. I asked you if the smoke was not there?

A. Yes, sir.

Q. You testified on the Bobo trial, did you not, that there was a considerable amount of dust and smoke raised by the southbound train around that crossing, did you not?

29 A. I did and you also tried to bring out the point you are trying to bring out now that there was more than I actually said there was.

Q. Am I trying to bring out more than you said there was?

A. You are trying——

The Court: Just answer the question. Don't get to arguing. You answer, that is all.

A. Well, there was a considerable amount of smoke, not enough to obscure the train, as I said while ago.

Q. You never said anything about that on the former trial, did you?

A. I don't know, I don't remember.

Q. Didn't you testify on the former trial that there was a very considerable amount of dust and smoke there, and isn't this subsequent information from you voluntary information that the train was not obscured put in for the first time now?

A. I don't remember whether I said that before, but I do remember distinctly you trying to emphasize the amount of smoke and dust and I thought at the time——

The Court: Don't state what your impression was. Just state what you know.

Mr. Waring:

Q. State what you know, whether there was smoke and dust at that crossing?

A. Yes, there was, but not a considerable amount.

Q. Well, not a considerable amount, but a great big amount?

The Court: Don't argue about it.

Q. When you looked up to see how far the southbound train was, how many cars passed you, how far was the caboose of the southbound train away?

A. I could not tell you, but very close.

Q. How many cars had to pass?

A. Just a few.

Q. You say it was not the whistle of the northbound train?

A. I would not swear it was not the whistle of the southbound train, but I think it was the whistle of the northbound train.

Mr. Anderson: Wait a minute. Let him finish.

A. I think it was the northbound train whistle I heard.

Q. How many whistles were blown?

A. I could not say positive, I don't remember.

Q. Was it one or two long blasts, short blasts, or how was that?

A. I don't remember exactly because I did not pay enough attention to the number of whistles, I was too busy watching the train.

Q. Did you testify in the Bobo trial that you heard any whistles blow?

A. I think I did.

Q. Did you testify how many were blown?

A. I don't remember.

Q. How long was it—when you saw this engine 500 feet and you looked back to see the southbound train pass, how long was it before you heard the whistle blow?

A. That is too long ago to remember those little details; I could not tell you to save my life.

Q. Did you hear the whistle before or after that time?

A. I think it was the whistle that attracted my attention to the train but I don't remember positively.

Q. You don't remember about that. That is all.

Redirect examination.

By Mr. Anderson:

Q. Mr. Zimmerman, have you any interest in this law-cuit in any way, shape or form?

A. None whatever.

Q. You were just subpœnaed to come up here?

A. Yes, sir.

Mr. Waring: Let him testify. I object to his leading the witness.

Witness excused.

Mr. J. H. Pool, a witness in behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Please state your name to the court and jury?

A. J. H. Pool.

Q. Mr. Pool, what was your business in September of last year?

A. The 17th?

Q. Yes, sir.

A. That of locomotive fireman.

Q. For what road were you working?

A. Illinois Central.

Q. Were you fireman on the engine of the Illinois Central that ran into a street car of the Memphis Street Railway Company?
A. I was.
Q. At the intersection there in the city of Binghampton?
A. Yes, sir.
31 Q. Mr. Pool, where were you coming from and where were you going?
A. I was on my way to Fulton, Kentucky.
Q. From Memphis, to Fulton, Kentucky?
A. Yes, sir, we left Nonconnah.
Q. You had left Nonconnah yards?
A. Yes, sir.
Q. And in order to get into the record, Nonconnah yards is south of the place where this accident occurred?
A. Yes, sir.
Q. And about how far south was it?
A. Well, I could not say exactly, but somewhere around about three miles.
Q. About three miles south. Now, about how many cars did you have in your train?
A. We had 89 cars and caboose made 90 cars.
Q. Ninety cars, and had you made a stop between the Nonconnah yards and the place where this accident occurred?
A. We had.
Q. Whereabouts did you stop?
A. At Aulon, for the N. C. & St. L. Railroad crossing.
Q. Now, how far was Aulon up from where this accident occurred?
A. Just about a little over a mile, I could not say exactly how much it is.
Q. And what is the condition of the track between Aulon and up to the place where this accident occurred, is it straight or curved?
A. Straight track there.
Q. Straight track?
A. Yes, sir.
Q. About what time did this accident occur?
A. 6:35 p. m.
Q. Did this engine or not blow the regular crossing signal for this crossing?
A. It did.
Q. How many blasts of the whistle?
A. Two long and two short blasts of the whistle, as required by the rules and the law for the state for I. C. crossings.
Q. What was the bell doing, if anything, on approaching that crossing, and tell how long it had been doing that?
A. It was ringing continuously and had been started at Aulon when we stopped for the N. C. & St. L.
Q. Explain how that is to these gentlemen, what you
32 mean by starting at Aulon. How did you ring that bell?
A. By air, automatic bell ringer.

Q. And it had been ringing continuously all the time from Aulon up to the time of the accident?
A. Yes, sir.

Mr. Waring: I object to his leading the witness.
The Court: Don't lead the witness. Let him state what occurred.
Mr. Anderson: I was guilty of repetition but not of leading.

Q. Mr. Pool, will you go ahead—I will first ask you this: Before you got to that crossing and before a collision took place, did you pass another train?
A. Before we got to the crossing?
Q. Yes, sir.
A. The engine of the southbound train passed us.
Q. Of a southbound Illinois Central train?
A. Yes, sir; 1504.
Q. Which track—there are two tracks there, are there?
A. Yes, sir.
Q. And it was on which track?
A. On the southbound track.
Q. That would be the west track?
A. That would be the west track.
Q. I forgot to ask you before I got to this other proposition, was it dark or not at 6:30?
A. Just about dusk.
Q. About dusk?
A. Yes, sir.
Q. Was your headlight lit or not?
A. It was burning and burning brightly. I lit it myself.
Q. Where did you light that headlight?
A. At Nonconnah, before leaving the round house.
Q. Now, as you — approaching that crossing you have already stated that the bell was rung and the whistle was sounded.
A. It was.
Q. Will you now just tell these gentleman what you saw, what took place, just narrate to them from that time up to this accident?
A. Well, when I first saw the street car it was about 150 feet from the distance that I saw it, and I saw the conductor signal to the motorman with his hand like that (illustrating), for the motorman to proceed on over the railroad crossin. He was on the west rail of the northbound main, and the car proceeded over the
33 crossing, and the motor car got by and the trailer was struck just about two feet from the center door to the best of my knowledge.
Q. Now, when you saw that where were you?
A. I was on the left hand side of engine 1565.
Q. At the time you say you were 150 feet away when you saw that. Where was the caboose of the other train at that time?
A. Just about even with the cab of our engine.
Q. When you saw that what efforts, if any, did your engineer make to stop?
A. He proceeded to put the brakes on in emergency, as I had told

him to. I hollered at him to apply his brakes in emergency when I saw the street car going on the track.

Q. About how fast were you running?

A. Well, about eighteen miles an hour.

Q. And you say you had ninety cars?

A. Ninety.

Cross-examination.

By Mr. Waring:

Q. Mr. Pool, you say you blew your whistle?

A. We did. I never, my engineer did.

Q. Where was that whistle blown?

A. It was blown about a quarter of a mile back from Broad street for the Broad street crossing.

Q. Was that the last time you blew a whistle?

A. No, sir; that was the first time.

Q. Well, where did you blow it again?

A. The last time we blew it about a car length from Broad street crossing for the crossing ahead, which is Summer avenue.

Q. That was about the time you saw this car coming, wasn't it?

A. 150 feet, about 150 feet, is the time that I saw the car, when I saw the conductor signal the motorman to come over with it.

Q. You don't understand my question. You say that a quarter of a mile from Broad street crossing you blew your whistle?

A. Regulation whistle.

Q. Now, then, when you were about a car length from the Broad street crossing again you blew another whistle?

A. For the Summer avenue crossing just beyond the street railway crossing.

Q. That is the Summer avenue crossing?

34 A. Yes, sir.

Q. When you were fifty feet from Broad street, about forty feet, a car length, you blew the whistle.

A. The engineer blew the whistle.

Q. After you had blown that whistle about how far did your train travel before you saw this street car come out from behind this other train?

A. What is your question?

Q. After that whistle had been blown for the Broad street crossing —I mean blown at Broad street or a car length from Broad street, after that whistle was blown, about how far north did your train travel before you saw this street car coming out from behind the south-bound train?

A. I could not state exactly.

Q. Well, approximately, I mean.

A. I could not say exactly.

Q. How far were you from the crossing, the Raleigh Springs Railroad crossing and the I. C. crossing, how far were you from that crossing when you first saw the street car?

A. When I first saw the street car?

Q. Yes, just how far were you when you first saw the car?

A. About 150 feet when I first saw the street car.

Q. Well, then, you were practically—you were already across Broad street then, were you not?

A. No, we were not across Broad street.

Q. Well, were you at Broad street when you saw the car? You were forty feet away from Broad street when you blew your whistle. Now, then, had you gotten to Broad street when you saw the car?

A. No, we had not got to Broad street when I saw the car.

Q. Well, you then saw the car and blew your whistle at about the same time, did you not?

The Court: Colonel, you have borne down on that long enough. I can't see the purpose.

Mr. Waring: It is just to show that there was no whistle.

The Court: That would not relieve you of any negligence.

Mr. Waring: They have been contending they blew the whistle. Here is my purpose. The plaintiff would not have put this witness on if it was not for the purpose of showing that the whistle was blown there. Now, my defense is they blew no whistle and we had no notice it was coming at all.

The Court: That don't excuse you.

Mr. Waring: If it is not material I move to exclude this plaintiff's evidence as to whether the whistle was blown, as absolutely immaterial.

Mr. Anderson: I think it is competent to show how grossly careless the Memphis Street Railway Company was.

The Court: Let your motion be overruled.

Mr. Waring: To exclude that part of the evidence?

The Court: Yes, sir.

Mr. Waring: Does your Honor——

The Court: What I am holding is that if they did not blow the whistle it would not excuse you from any negligence.

Mr. Waring: I move to exclude it, as immaterial.

The Court: I overrule your motion. It may be competent for some other purpose.

Mr. Waring: Your Honor holds I cannot cross-examine him about the whistle?

The Court: I hold you have cross-examined enough.

Mr. Waring: Defendant excepts to not being allowed to further cross-examine the witness as to the location.

The Court: Yes.

Mr. Waring:

Q. Mr. Pool, when you first saw the street car it was then moving on across the track, was it not, the first set of tracks, I mean?

A. It was.

Q. And it was practically on your track, or got on there almost instantaneously, did it not?

A. Not on my track exactly, no.

Q. What is that?

A. Not on my track exactly, no.

Q. But it was practically at your track, wasn't it, moving?

A. Practically at my track.

Q. Could you see whether there was any confusion in the car?

A. I saw the passengers get up trying to get out of the street car.

Q. Now, where was your car, your engine, when you called the engineer's attention to the fact that there was a street car on the track, where was your engine with reference to the crossing then?

A. With reference to the crossing, of the railroad crossing?

36 Q. Yes, with reference to the crossing where the collision took place, how far was your engine from the crossing when you called the engineer's attention to it?

A. I could not state exactly how far it was from the crossing.

Q. Did you blow any other whistle at that time?

A. No, sir, only the regulation whistle for the road crossing, two long and two short blasts, which was blown twice.

Q. Now, then, when you saw the car approach your track, was there any alarm signal blown then by the engineer to stop or call his attention to it?

A. Not after the whistle was blown, as I have explained before.

Q. That was the only whistle blown then?

A. Yes, two blasts, road crossing.

The Court: Now, Colonel, I have just held that you have examined about that whistle sufficient and you have gone right back to it. I will have to ask counsel to observe the ruling of the court.

Mr. Waring: I was asking about an alarm whistle, is what I am trying to find out about.

The Court: I can see the further materiality of the examination if you go ahead, but I cannot see how anything would be further elicited or helped by further examination on that question.

Mr. Waring: Defendant excepts.

The Court: Yes, go ahead.

Mr. Waring:

Q. Mr. Pool, how far did your engine run before you stopped after you hit the trailer?

A. How far? The distance?

Q. Yes.

A. It was about 214 feet. That was where we come to a standstill.

Q. The engine derailed, did it not, when it struck the trailer?

A. Yes, sir.

Q. And tore the track up?

A. The track went with the engine, went down a six foot fill.

Q. Ran 214 feet?

A. That is from the street railway crossing.

Witness excused.

Mr. Anderson: Now, as I understand it, four witnesses are all your Honor allows?

The Court: Yes.

Mr. Anderson: I have two passengers, and the last witness,
37 and I am going to put this one on, the southbound train. That is all your Honor allows?

The Court: Yes, I think that is sufficient.

Mr. Anderson: I just wanted to understand your Honor.

Mr. J. J. Hill, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Anderson:

Q. Is your name Hill?

A. Yes, sir.

Q. What is your full name, please sir?

A. J. J. Hill.

Q. Mr. Hill, were you the conductor in the caboose of the southbound train?

A. Yes, sir.

Q. You were that conductor?

A. Yes, sir.

Q. You were in the employ of the Illinois Central Railway Company on September 17th of last year?

A. Yes, sir.

Q. And were you in the caboose of your train that was going south on the west track?

A. Yes, sir.

Q. How many cars did you have on your train?

A. Fifty-two, including the caboose.

Q. Mr. Hill, will you just go ahead and tell these gentlemen if you saw this collision, and where you were standing, and what took place, and all you know about it in your own way?

A. I was sitting in the east window of the caboose, or door, we have a door in the side of our caboose from the roof down to the floor.

The Court: You were sitting in the door on the east side of your caboose. Go ahead. We don't care about the construction of the caboose.

A. On the east side of the caboose, and passed the engine just south of Broad street, I believe that is the name of the street, the first street south of the street car crossing.

Mr. Anderson: In other words, to get this in the record, there is Broad street and then there is the street car crossing, and then Summer avenue further north?

A. Well, yes, sir. I passed this engine just about, just south of Broad street, and as they passed I looked at the engine to see if I could recognize the crew on this engine, and of course in pass-
38 ing I naturally turned looking back north, and I noticed the street car coming on the track, and then I watched this. I seen the motor car go by, and it seemed quite a little bit, I thought probably it had gotten in the clear, and then I seen the trailer com-

ing on the track, and I saw it then when it hit, that is the trailer had almost passed out of my view before it hit.

Q. Mr. Hill, about how far was the caboose that you was in south of that crossing when the street car started across?

A. Well, I was just about even with the crossing, coming off of the street crossing.

Q. You mean Broad street?

A. Broad street; yes, sir.

Q. And about how far was Broad street from the street car crossing?

A. About sixty or seventy feet.

Q. About sixty or seventy feet?

A. Yes, sir.

Q. Then when you were sixty or seventy feet south of the street car crossing the street car started up and started across?

Mr. Waring: Now, wait a minute. That is a leading question.

The Court: Just let him state.

Mr. Waring: The witness did not state that at all.

The Court: Let him state what occurred.

Mr. Anderson: I just wanted to see if I understood him.

The Court: If you have any doubt ask him what he said.

Mr. Anderson:

Q. What I wanted to know is where you were, how far was your caboose south of the street car crossing when the street car started up and started to go across?

A. About sixty or seventy feet.

Q. That is what I understood him to say, about sixty or seventy feet.

A. Yes, sir.

Q. And about how far was your caboose from the crossing when you passed the engine of the northbound train that afterwards struck it?

A. Well, it was about the same distance.

Q. Do you know whether or not the headlight of the northbound engine was lit?

A. Yes, sir.

Q. Did you hear any alarms given either by the whistle
39 or the bell of that northbound train?

A. Yes, sir.

Q. What alarms were given?

A. I heard the whistle blow just about the time it passed me.

Q. Did you see the conductor of the street car out there on the track?

A. No, sir.

Q. Did your train come suddenly to a stop there for some reason?

A. Yes, sir.

Q. Do you know what it was?

A. We had—found out afterwards we had hit a car that was in

this northbound train. My engine had collided with a car that had jumped over on the southbound track.

Q. In other words, when the brakes was put on the northbound train a car jumped out and jumped into your train?

A. Jumped out in front of my train, yes, sir, and collided.

Cross-examination.

By Mr. Waring:

Q. Mr. Hill, when this street car first came into your view where you could see it you were about sixty or seventy feet from the crossing?

A. I would judge that far.

Q. From where the car was?

A. From the street car crossing.

Q. You were on the east side of your caboose, looking out the east door?

A. Yes, sir.

Q. And you watched the engine as it passed you?

A. Yes, sir.

Q. And turned and followed it as it moved north?

A. Yes, sir.

Q. And as you looked north at the engine you saw this car come into view?

A. Yes, sir.

Q. So it came into view from behind your car?

A. Yes, sir.

Q. You did not see the street car when it started up on the west side of the track?

A. No, sir.

Q. You could only see it after it crossed your track, practically?

A. Yes, sir.

40 Q. And at the time you saw it you were about sixty or seventy feet from it?

A. I should judge that.

Q. And at the time you passed it the engine was just about the same distance from it?

A. Yes, sir; about the same, I guess.

Q. And about the same time you heard this whistle blown?

A. Yes, sir.

Witness excused.

Mr. Anderson: Now, according to your Honor's ruling, that is all the witnesses we will put on in the two cases as to the liability.

Mr. E. O. McCoy, one of the plaintiffs herein, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Crabtree:

Q. Will you state your full name to the court and jury?
A. E. O. McCoy.
Q. Mr. McCoy, where do you live?
A. I am living in Arkansas at the present time, Jonesboro.
Q. Is that your home?
A. Yes, sir.
Q. Are you a resident and citizen of the State of Arkansas?
A. How is that?
Q. You are a resident and a citizen of the State of Arkansas?
A. Yes, sir.
Q. Where were you living last September, on the 17th?
A. I was living on the other side of Binghampton, in the subdivision called Bon Air.
Q. You have heard the testimony about the collision between a street car of the Memphis Street Railway Company and an Illinois Central engine at one of the crossings in or near the town of Binghampton?
A. Yes, sir.
Q. Were you or not a passenger on that street car?
A. Yes, sir.
Q. Where did you board the car and what was your destination; where were you going?
A. I boarded the car at Binghampton and I was going to Holmes avenue.
Q. Beyond Binghampton?
A. Yes, sir.
41 Q. The street car was made up of what is known as a motor car and a trailer?
A. Yes, sir.
Q. Did you become a passenger on the motor car or the trailer?
A. Trailer.
Q. In the trailer?
A. Yes, sir.
Q. Did you have a seat in the trailer?
A. Yes, sir.
Q. At what point in the trailer were you seated?
A. About half way between the center of the car and the back end, just in front of the colored population.
Q. And on which side?
A. On the north side.
Q. Now, I wish you would tell just what you saw of this accident, Mr. McCoy?
A. Well, I didn't see a great sight of it. I was sitting there in the car——

Mr. Waring: Now, if your Honor please, I object to any direct evidence as to the happening of the accident by the plaintiff.

The Court: I thought I announced, gentlemen, on the question of liability, as to what occurred at the time of the accident, I would limit you to four witnesses. Now, you gentlemen have gone on and put the plaintiff on and want him to detail what occurred.

Mr. Crabtree: I want to adhere, stay strictly within your Honor's ruling. Now, I did not think that your Honor intended to exclude this plaintiff.

The Court: You did not put him on.

Mr. Waring: That is my objection, that he ought to have gone on first.

The Court: That was your matter. I left it entirely to you to put on your testimony as you saw proper.

Mr. Anderson: I was to blame for that. I thought you meant four witnesses in the other case before we started this one.

The Court: Go on. The gentlemen ought to put on their best evidence first because they don't know where they are going to stop.

Mr. Waring: My purpose—I was not objecting to the limiting of it for four witnesses. I am objecting to this plaintiff—he ought to have been put on under the rule if anybody else is going to testify to the accident.

The Court: No, he is the plaintiff. He is entitled to be present.

42 Mr. Waring: The rule as I understand it—the rule in the Circuit Court is for the plaintiff to be put under the rule if other witnesses are introduced first.

The Court: No, there is no such rule here.

Mr. Crabtree:

Q. Mr. McCoy, just briefly tell what you saw of the collision.

A. Well, we ran up the track and stopped and waited until the southbound train passed, and as soon as the southbound train passed we started right on across, and before we got far enough, that is, the trailer where I was, got far enough by the southbound train to see what was coming, I seen the commotion in the front of the car and I looked over to see what it was. When I looked out and we got far enough by, the train got far enough away so that I could see the engine coming, that was the first I seen of it and almost the last, because it was so quick that everybody started to the door. I raised up, of course, to get out of the seat, but everybody started for the door. I got up and looked around. I could not see no place I could go, there was nothing I could do, I was perfectly helpless.

Q. Mr. McCoy, right at that point, tell the jury what sort of a car that was, whether there was any exit to that car except the door.

A. There was no exit at all except the collapsible door in the center attached to one of those steel trailers. I thought about trying to get out the window but there was iron bars up there.

The Court: Well, there is no negligence of that kind alleged here.

Mr. Crabtree:

Q. Mr. McCoy, you were standing there and saw the engine coming?
A. Yes, sir.
Q. When did you next know anything and where were you?
A. Well, I was in St. Joseph's hospital.
Q. How long after that, do you know?
A. It was Monday about 4:30 or five o'clock in the evening.
Q. What day of the week was it this collision occurred?
A. Thursday.
Q. On Thursday?
A. Yes, sir.
Q. Now, will you tell the court and jury what injuries you had on your person when you came to yourself at St. Joseph's?
A. Well, when I woke up in St. Joseph's hospital I found I had a very badly broken leg, all the side of my face and head was
43 burned off, that I had lost my eye, so did I, and they all thought that, but it finally got better.
Q. You put your hand on the right side of your face on that scar. I will ask you if that is the place where you were burned.
A. Yes, sir.
Q. How far back on your head does that scar go; will you show the court and jury that?
A. Back there (indicating).

The Court: The jury can see it.

Q. Which leg was it that was injured?
A. My left leg.
Q. What sort of a break did you have in that left leg?
A. Well, it was a compound fracture.
Q. At what point on the leg?
A. Right there (indicating.)
The Court: Between the knee and the ankle.
A. Between the knee and the ankle.

Mr. Crabtree:

Q. Mr. McCoy, how long were you confined to the hospital at that time?
A. I was there seven weeks and a day the first time, and then I went back for treatment again on the 15th of January, and I was discharged on the 18th of March.
Q. What doctors treated you, Mr. McCoy?
A. Dr. Mason and Dr. Haynes.
Q. Whose doctors were they, yours?
A. They were street car doctors.
Q. Did you have your doctor in consultation with them?
A. Yes, sir.
Q. What was your doctor?
A. Dr. Terrell.
Q. Dr. S. D. Terrell?

A. Yes, sir. I tried to have him wait on me but I did not succeed very well.

Q. The physicians of the street railway took charge of the case?

A. Yes, sir.

Q. What hospital bills did you pay or nurse hire?

A. I paid——

Mr. Waring: Just a minute, I didn't exactly understand that. Is it the contention here that the street railway company's——

Mr. Crabtree: That the street railway company's doctors took charge of the case. He said he wanted his doctors.

Mr. Waring: He is not objecting to that.

44 The Court: You are not objecting to the street railway doctors attending you, do you?

A. How is that?

The Coourt: You are not objecting to the street railway doctors attending you?

A. No, sir.

The Court: Now, go on.

Mr. Crabtree:

Q. What operations did they perform on you, Mr. McCoy?

A. Well, they scraped my skull there and cut a piece in the scalp out and swung it around to cover up the vacancy in the scalp where it was burned off, and cut my eye and tried to do plastic work on my eye.

Q. How many operations altogether—how many times were you on the operating table while you were in the hospital?

A. Five.

Q. Five times. What is the condition of your leg?

A. Well, the condition is very bad. The bones are reset apart like that (illustrating), sideways, they are not set true at all.

Q. Can you walk upon that leg without the use of crutches?

A. I am afraid to try. I am afraid it will just slide up.

Q. And crush down?

A. And have to have it taken off.

Q. How old are you, Mr. McCoy?

A. I am fifty-one now.

Q. I will ask you to tell the court and jury whether you suffered much or little from those injuries?

A. I could not explain how much I did suffer.

The Court: I think that is a very sensible answer. I would not try to.

A. I am not master enough of the English language.

Mr. Crabtree:

Q. Tell the court and jury whether you suffer yet from it?

A. Yes, sir, I certainly do.

Q. What has been the effect of that injury upon your eyes?

A. Well, it has deprived me of reading entirely, and it has deprived me of doing any kind of work that I have to see very close what I am doing. Of course I can see to walk or something like that but any kind of work that I want to do that I have got to see how to do I have to give up because I can't see.

Q. What is your ability to bat that eye?

A. None whatever.

45 Q. Tell the court and jury what you have to do to keep that eye moist so as to keep it from going out altogether?

A. I have to use artificial lubrication in the shape of gauze patches annointed with vaseline, something of that kind, to keep it covered at night and part of the time in day. I have got to keep that gauze patch over the eye to lubricate it.

The Court: The jury can see the man's condition. Let's don't dwell on that.

Mr. Crabtree:

Q. I want you to tell the jury what was the occasion of your returning to the hospital January 15th. Why did you go back?

A. On account of my eye and my head.

Q. Were or not operations performed on your eye and head after that?

A. Yes, sir.

Q. Now, did you have any other burns on your person besides the burns on your head and face?

A. Well, not enough to speak of. There was a little burn on my shoulder where it burned through my coat, not enough to amount to very much.

Q. Any other injuries on your person besides your head and leg?

A. Yes, sir.

Q. What, whereabouts?

A. The other leg was very badly bruised. They thought it was broken at the start but it was not, very badly bruised and skinned, and then I was bruised in the back considerably.

Q. I hand you two photographs and I will ask you to state what they are?

A. Well, that is a photograph I had taken a short time ago.

Q. How long ago?

A. I guess about three or four years, something like that.

Q. And what is the other photograph?

A. That is a copy of the smaller one.

Q. Now, I will ask you, Mr. McCoy, whether or not that photograph represented your appearance?

The Court: If it was a photograph of course it did.

Mr. Crabtree: Beg your Honor's pardon.

The Court: The very fact it was a photograph shows it represented him.

Mr. Crabtree: Will you introduce those two?

Mr. Waring: I don't see the purpose.

The Court: I don't either, unless he is seeking to recover
46 for marring his personal appearance.

Mr. Waring: The jury can see.

Mr. Crabtree: If his features were perfect before the accident——

The Court: Well, this side of his face would show what his features were on the other side. Go ahead.

Mr. Crabtree: Your Honor excludes the photographs from the jury?

The Court: I am not excluding them. I don't hear any objection.

Mr. Waring: I object to them. I don't think that is competent.

Mr. Crabtree: I think it is proper for the jury to see them.

The Court: Yes, I will exclude it.

Mr. Crabtree: All right, your Honor.

Q. Now, Mr. McCoy, in what business were you engaged at the time of this accident, if any?

A. I was running an automobile shop.

Q. What is your trade generally?

A. Plastering.

Q. Plastering?

A. Yes, sir.

Q. What was your earning capacity, and about what were you earning at the time you had this accident?

A. Well, I was earning from four to $10 a day.

Q. How long had you been running this automobile shop?

A. About six weeks or two months, something like that.

Q. Prior to that when you were working as plasterer what did you earn?

A. $6.00 a day for eight hours.

Q. What was your ability to work continuously before you had this accident?

A. Well, I was working every day.

Q. Working every day?

A. Yes, sir.

Q. What has been your ability to work since the accident?

A. None whatever. I have not done any kind of work at all.

Q. Now, I want to ask you this question, Mr. McCoy, what you paid for nurse hire and doctor's bills and hospital fees, if anything?

A. I paid $176 nurse bill.

Q. Nurse bill?

47 A. Yes, sir.

Q. The Street Railway Company paid the hospital bills?

A. Yes, sir.

Q. And their doctors' bills?

A. Yes, sir.

Q. Have you paid Dr. Terrell his bill?

A. No, sir, I have not paid him yet.

Q. I will ask you whether or not you are still under his treatment?

A. Yes, sir.

The Court: How much do you owe him, do you know?

A. I don't know. I asked him yesterday for his bill but he did not give it to me.

Mr. Crabtree: I have the doctor here.

The Court: Well, there is no need now to introduce two or three doctors to prove this man's condition. That is apparent to the jury.

Mr. Crabtree: I want to state to your Honor I want to introduce the doctor about that eye and Dr. Terrell, and the doctor that made the X-ray of his leg, and that is the extent of my proof.

The Court: Are you making any point on the extent that this man is injured?

Mr. Waring: Dr. Haynes, our surgeon, treated him. I will have him here. He is the only man that ever treated him.

Mr. Crabtree: No, Dr. Mason.

The Court: The man had his leg broke, and was burned.

Mr. Waring: I concede that. I will concede that his leg was broken; our records show that.

Mr. Anderson: We want to show how bad it is, your Honor.

The Court: A broken leg is a broken leg. He says it is a compound fracture.

Mr. Anderson: He says the bones are broken this way (illustrating).

The Court: Have you sued for malpractice of the doctors?

Mr. Anderson: No, sir.

The Court: The railroad company could not be held for malpractice. It was a compound fracture.

Mr. Crabtree: Wouldn't the defendant be liable for any result from that? If he had to have it amputated it would be liable.

The Court: I don't think we will go into that.

48 Mr. Anderson: We are not charging any malpractice. I take it the physician's services that were rendered are perfectly competent.

The Court: If that is so it was not practicable to set his leg any better than it was set.

Mr. Anderson: Yes, sir, it was so badly broke. We want to show how badly broke it is.

The Court: It could not be set any better than it is. Now, he says that the leg, the ends of the bone do not meet in apposition but they pass, that is what he says about it.

Mr. Waring: A compound fracture.

The Court: A compound fracture, and you could not explain that, it could not be any more so.

Mr. Crabtree: An X-ray picture will show just how it is.

The Court: Just show two bones this way (illustrating).

Mr. Crabtree: That is what I want.

The Court: There is no need of showing that.

Mr. Anderson: If Mr. Waring concedes that.

The Court: Your witness has testified to that already.

Mr. Crabtree: Will your doctors controvert it?

The Court: If he controverts it I will let you put on other witnesses. The man has stated his own injuries and they are apparent, all of them, except the broken leg.

Mr. Crabtree: I want to keep within your Honor's ruling, and I had a photograph of this man's condition taken while he was in the hospital——

The Court: You need not show that at all.

Mr. Crabtree: Your Honor will exclude that?

The Court: Yes.

Cross-examination.

By Mr. Waring:

Q. Mr. McCoy, where was your business you say at the time you got hurt?

A. On Court avenue.

Q. How is that?

A. On Court avenue.

Q. Were you in business for yourself?

A. Yes, sir.

Q. What was the style of your firm?

A. It was an automobile repair shop.

Q. I say, what was the style of your business, just in your name?

A. Yes, sir.

Q. And whereabouts on Court avenue was it?

49 A. Right there on the alley between Second and Third street, or the south side, just across the alley from the new exchange building.

Q. You had been in that business about a month, you say?

A. About six weeks.

Q. About six weeks or two months?

A. Yes, sir.

Q. And you were a plasterer by trade?

A. Yes, sir.

Mr. Waring: I don't care to ask him any more questions for the time being.

Witness excused.

Mr. Anderson: Your Honor, we have Dr. Leroy here, but in view of your Honor's statement you did not want us to take time to prove it. We have a number of X-ray pictures. Of course if Mr. Waring says he is not going to put on any doctors to controvert Mr. McCoy's statement——

Mr. Waring: Statement to what effect?

The Court: He said he had a compound fracture and that in setting the ends of the bones did not meet in apposition, but slipped up that way (illustrating) and he has got a union in that shape instead of this (illustrating).

Mr. Crabtree: You concede that is true?

Mr. Waring: Yes, sir.

Dr. SIMPSON, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Crabtree:

Q. Doctor, please state your name to the court and jury?
A. Dr. Simpson.
Q. I will ask you, doctor, whether or not you are a specialist, and if so, what have you specialized in?
A. I do eye, ear, nose and throat work, and specialize in eye, ear, nose and throat.
Q. Eye, ear, nose and throat. I will ask you if you examined the plaintiff here, Mr. E. O. McCoy, the man who has the burned eye?
A. Yes, sir, I have.
Q. I wish, doctor, you would tell the court and jury—when did you make your examination of his eye?
A. I examined him on the 12th of this month this year.
50 Mr. Waring: Just a minute. The 12th of this month you say?
Mr. Crabree: Yes.
Q. I will ask you if you made a thorough test of his eyes, doctor?
A. I did, sir.
Q. I will ask you to tell the jury the condition of that right eye with reference to his sight?
A. His vision is two-fifths of normal, that is a little less than one-half of the normal vision.
Q. What is the vision in the other eye?
A. The other eye is normal, what we call 20/20ths, or normal.
Q. Doctor, take an eye afflicted as Mr. McCoy's so that it is impossible for him to bat it——
The Court: Now, he saw the eye. He says he can tell what the condition of it is.

Mr. Crabtree: Tell the jury what the effect of that sort of an injury will be to the eye permanently, if there is any remedy, and if it can be remedied how it can be remedied; just tell the jury all about that eye without my asking, what will have to be done to it?
A. Well, the vision—I will start by comparing the two eyes—the vision in the left eye is normal and is quite a good eye. The other eye, the right eye, the vision is two-fifths normal, what we call 20/50th.

The Court: Yes, we understand what two-fifths is. Now proceed. We understand what two-fifths is.

Mr. Crabtree:

Q. Just proceed and tell what the effect is.
A. Yes, sir. Glasses on the right eye do not aid the vision. They won't do any good, and without these, as this man has gone along for the last few months, he has saved, as I have just stated, about half vision. While ordinarily we would not expect a man to retain

as much vision as he has, having no lid over the eye, I was a little surprised at finding that much vision, but he tells me he has used some lubricant and some patch over that eye, especially when he sleeps, and most of the time through the day, so that would account for that. This eye is very liable to be lost and as you know is partially gone now. There is not any scar on that eye. There is nothing the matter with the back part of the eye. The nerve is perfectly normal and the media in the back of the eye is normal. The front of the eye, to all appearances, is a fairly good eye, but on close examination one finds that the part of the eye directly in front of the pupils is a little thickened. That is due to the air coming in contact with the front of the eye on the part of the eye in front of the pupil having no lid does not go down over here to give it the normal lubrication and protection would continue to grow worse. The skin or the clear part of the eye, the part that should be clear, in front of the pupil, becomes thickened and opaque or so that one could not see, sort of hazy, as time would go on. As there is no lid over this eye he is in danger at all times of getting a cinder or foreign body of any kind in this eye, causing a laceration of it. The reason that is so is because there is nothing to——

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Mr. Waring: I don't think that is competent, your Honor, the possibilities.

The Court: Of course it is not. You need not go into that.

Mr. Crabtree:

Q. Doctor, will he ever recover from that injury to the eye?

Mr. Waring: Well, that is probably for the jury.

The Court: You may state your opinion about that as an expert.

A. No, sir; not entirely.

Cross-examination.

By Mr. Waring:

Q. You say he won't entirely recover?

A. No, sir.

Witness excused.

Mrs. E. O. McCoy, a witness in behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Crabtree:

Q. Mrs. McCoy, you are the wife of the plaintiff, E. O. McCoy, here?

A. Yes, sir.

Q. When the accident happened to him last September where was he carried?

A. He was carried——

The Court: Now, what is the purpose of that? He states he was carried to the hospital.

Mr. Crabtree: All right.

Q. Were you with your husband continuously after that accident?

A. Yes, as near so as they would let me be.

Q. How long before he regained consciousness?

The Court: He states he was unconscious from Thursday until Monday. Why go over that again?

52 Mr. Crabtree: Yes, sir. I just thought that would be a controverted question.

Q. Mrs. McCoy, what was your husband's condition prior to the accident with reference to his ability to work?

The Court: Any question on that made, on his earning capacity, Colonel? Any question made on this man's earning capacity prior to the accident?

Mr. Waring: Your Honor, I don't know a thing in the world about his earning capacity. I don't think he was making $10 a day in an automobile shop.

The Court: He said he was making $4 to $6, and $6 as a plasterer.

Mr. Waring: I have no proof to deny that.

The Court: All right.

Mr. Crabtree:

Q. Will you tell the jury what the mental and physical condition of your husband has been since that accident up to the present, since he left the hospital?

A. It is not good. In fact, he is subject to morose spells. He is subject to spells mentally. He wants to destroy himself, get rid of himself.

Q. Do what?

A. Get rid of himself. He is not satisfied with life. He is morose and he suffers a great deal, and he seems to think——

Mr. Waring: The defendant objects to that as testimony of a layman as to whether a man is suffering.

The Court: Yes, I think that is. He has stated in regard to that.

Mr. Waring: Also that she has related about his condition. I ask that that be withdrawn.

The Court: Yes. The railroad could not be held for her condition.

Mr. Crabtree: As to his condition.

The Court: As to his condition, not what her condition was.

Mr. Crabtree: I have not asked about her condition. She said he was morose.

Mr. Waring: What I am objecting to, it is not competent for a layman to testify to what his physical condition is.

The Court: She can state about his habits and customs or moods, if she knows them.

Mr. Waring: She has testified to that.

Mr. Crabtree:

Q. What has been his condition, Mrs. McCoy, with reference to his ability to sleep and rest since the accident?

53 A. Very poor, very bad.

Q. What was his condition with reference to being able to sleep and rest before the accident?

A. Good.

Q. Prior to the accident was he morose, and did he ever threaten to destroy himself?

A. No, sir; never.

(Cross-examination waived.)

Witness excused.

Mr. Crabtree: Call Dr. Terrell.

The Marshal: Dr. Terrell does not answer.

Mr. Crabtree: If the defendant will let us state what his bill is——

Mr. Waring: My impression is that we paid Dr. Terrell's bill. He is the only man that knows that.

Mr. Crabtree: Well, we will find out how that is and not put him on the stand. We will agree to that, whether he has paid it or has not paid it.

The Court: All right.

Plaintiffs rest.

Thereupon the defendant, to maintain the issues in its behalf, introduced the following evidence:

Mr. Waring: I would like to ask your Honor this question: This rule of four witnesses, am I limited to my motorman and conductor, and two other witnesses? In other words, will they be counted?

The Court: Yes, four witnesses as to the manner of the accident. You see you might go on and introduce eight or ten or twelve, on the side and would not have it as clear.

Mr. Waring: Of course I would be expected to put my crew on. They are the people charged with negligence. I didn't know whether I could put on four more.

The Court: Two more. They are as competent witnesses as anybody else.

Mr. G. W. McCoy, a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waring:

Q. Your name is G. W. McCoy?

A. Yes, sir.

Q. Mr. McCoy, last September were you a motorman for the Memphis Street Railway Company?

A. Yes, sir.

Q. Were you running on this Raleigh Springs car that had this accident at the Binghampton crossing?

54 A. Yes, sir; I was.

Q. And you were the motorman in charge of the car?

A. Yes, sir.

Q. Mr. McCoy, did you stop at the crossing—but first of all I will ask you, your car was eastbound? Those matters are not denied?

The Court: Not denied.

Mr. Waring:

Q. Did you stop at the crossing there and let a southbound freight train pass?

A. Yes, sir; I did.

Q. When you were waiting for that train to pass where was your conductor?

A. He was standing on the right hand side of my car, down just in front of the car, on the right hand side.

Q. What was he doing off of the car?

A. Why he had got off there to flag that crossing there.

Q. That was his duty, was it, to flag the crossing, to know whether it was safe to go ahead or not?

A. Yes, sir.

Q. And you relied on his flagging the crossing?

A. Yes, sir.

Q. Now, he was standing down at the right hand side of your car down on the ground?

A. Yes, sir.

Q. While you stood there were you talking to anybody?

A. No, sir; I was not.

Q. Was the vestibule of your train open, or car open?

A. It was; yes, sir.

Q. Did you hear any whistle or any northbound train coming?

A. No, sir; I did not.

Q. The southbound train was making a noise, of course, as it went by?

A. Oh, yes, the rattle or the noise of the train, especially the trucks and everything crossing the street car crossing.

Q. Now, when the southbound train had passed, what did your conductor do?

A. Why the first thing he done was to walk across the tracks, the first track, and as he walked across the first track he was looking to his left.

Q. That would put him looking north?

A. Yes, sir; looking north.

Q. Now, on that set of tracks the train had just gone south?

A. Gone south, and as he walked across that track he

55 was looking to his left or the north, as you say, as he walked on the second set of tracks he turned his head in this direc-

tion (indicating), looking south, looking the way this train had gone, went across looking at the south, and then as he crossed over the last rail he throwed up his left hand that way (illustrating).

Q. That was the signal for you to come ahead?

A. To come ahead.

Q. And did you rely on that signal and go ahead?

A. Yes, sir; I did.

Q. Mr. McCoy, then after you started ahead, or rather I will ask you this now: When this southbound train passed and just before you started ahead, or just at the time you started ahead, did people in the car or anybody call to you to stop?

A. No, sir.

Q. Did you hear any notice or any call from anybody in the car, or any excitement that would lead you to believe there was anything the matter?

A. No, sir; not at all.

Q. When did you first, Mr. McCoy, know that, anything about this northbound train; where were you and how did you first know it?

A. I was just crossing over the far tracks, just as the front end of my car was up to the center of those tracks crossing over, why I had my head turned to the south.

Q. What do you mean by the far track; that was the track the train was on?

A. That was the track, the northbound track.

The Court: East track.

Mr. Waring: East track, the track the train was coming on?

A. Yes, sir.

Q. I see. Now, when you got the car about the center of that track, or coming upon that track, what happened then?

A. Why, I was looking to the south the way this train had passed and there was a kind of a short blast of a whistle, and just as that short blast come why the engine come approaching right out from amongst the smoke and dust and stuff right at—just across Broad street, just come dashing right out of that dust and smoke and stuff.

Q. Was there smoke around Broad street?

A. Yes, sir; right smart of smoke and dust around there.

Q. That was from the south bound train?

A. Yes, sir.

56 Q. At the time you heard this blast emerging from out of the dust and smoke where was the train?

A. Had not entered Broad street, just fixing to enter Broad street on the far side when I detected it.

Q. Up to that time had you heard anything or detected a noise?

A. Not a thing.

Q. Mr. McCoy, what, if anything, did you do?

A. Just as quick as I noticed the blast of course the engine and everything come right out of that at once, just as soon as I saw that I just lammed my controller right around to the post, give it full power.

Q. That jerked your car across?

A. That jerked my car across.
Q. Your motor car cleared the crossing, but your trailer was caught?
A. Yes, sir.
Q. Was your car moving at the time you saw this train coming?
A. Yes, sir.
Q. Could you have stopped and backed off the track?
A. No, sir; I could not.
Q. Was there anything but to try to rush across?
A. No, sir; that was the only thing I could do.

Mr. Anderson: I object to that. That was very suggestive and leading.

The Court: Let him tell what he did. The jury will determine that.

Mr. Waring:

Q. You say you could not back off?
A. No, sir.
Q. And your car was already on the track?
A. It was already on the track.
Q. Mr. McCoy, did you bring your car to a stop then start it ahead?
A. No, sir; I did not.
Q. Was there a difference in the movement of your car?
A. There was a sudden jerk in the car.
Q. What caused that?
A. When I throwed all the current on the car at once, the balance of it, we jumped, you know, that caused the car to jump forward.
Q. What kind of a headlight was that on that engine when you saw it?
A. You mean that locomotive?
Q. Yes.
A. Why it was an oil light.
57 Q. Was it burning bright or dim?
A. It was not hardly burning at all, just barely was burning.
Q. Oil headlight?
A. Yes, sir.

Cross-examination.

By Mr. Anderson:

Q. That train that struck you was pulling a long—that engine that struck you was pulling a long string of cars, wasn't it?
A. Yes, sir.
Q. And it was exhausting and using a great deal of smoke and steam, wasn't it?
A. I could not say so much about that. I did not hear it.
The Court: He says he did not hear it.
Q. And you were standing on the front end of your car with the vestibule door open towards the south?

A. Not the door, the vestibule windows.
Q. The vestibule windows were open to the south?
A. Yes, sir.
Q. And where you were standing all you had to do was to turn your head to get a full sweep of the south, wasn't it?
A. Well, you could not see over those cars and everything that was going south.
Q. That is all right, but there was no obstruction so far as arouno you was concerned to get a full sweep to the south, was there?
A. No, sir; there was not.
Q. And yet you say you got upon that second track and never saw that engine until it was within sixty feet of you; is that right?
A. It was across Broad street from there.
Q. Well, Broad street is about sixty feet from where you were?
A. Well, I never measured it.
Q. Don't you know it?
The Court: It is a short distance.
Q. Well, it is just a short distance and the engine was right there at Broad street before you ever saw it at all?
A. Yes, sir.
The Court: He has stated that.
Q. You say that this southbound train and cars made a whole lot of dust and smoke?
A. Yes, sir.
Q. It was so dense it was blinding?
58 A. It was plumb dark.
Q. Yet with this engine going south there and making so much smoke and dust it was plumb dark you started across the other track, didn't you?
A. I did.
Q. And this conductor, with that dense smoke and dust that made it plumb dark, signaled you ahead, didn't he?
A. Yes, sir.
Q. How far was the conductor from you when he signaled, about how many feet?
A. He was, I expect, thirty feet, maybe.
Q. Then you could see the conductor thirty feet ahead signaling you through this plumb dark condition?
A. Yes, sir.
Q. But you could not see a great big engine sixty feet away?
A. It was not there when I started my train.

Redirect examination.

By Mr. Waring:

Q. Your car had an electric headlight on it, didn't it?
A. Yes, sir.
Q. Your conductor was out in front of that electric headlight?
A. Yes, sir.
Q. Car lighted up inside?
A. Yes, sir.

Q. Mr. McCoy, I want to ask you this question: Had you been on that run regular?
A. Yes. sir.
Q. What had been your habit and practice about meeting a southbound train at that point?
A. Met one there every evening.
Q. Did you meet a northbound train?
A. No, sir.
Q. Was that an unusual thing?
A. Hadn't never met one there at that time of day.

Recross-examination.

By Mr. Anderson:

Q. I just want to ask what are you doing?
A. I am working for the Memphis Street Railway Company.
Q. In what capacity?
A. I am running a car.
Q. As motorman?
A. Conductor.
Q. Is the conductor over the motorman? Do you count that a promotion?
59 A. Yes, sir.
Q. You have got that job since this accident?
A. Yes, sir.
Q. You have been promoted?
A. Yes, sir.

Mr. Waring: I object to that.
Mr. Anderson: We have got an allegation that this conductor was promoted, that the act was ratified by the street car company and we ask for punitive damages.
Mr. Waring: I move to exclude that evidence. There is no evidence of punitive damages. The fact that a man has an accident, a motorman operating a car goes ahead when he was signaled to go ahead does not justify that. That certainly is not competent.
The Court: I don't think it is material here, Mr. Anderson, I will sustain the motion to strike that testimony from the record.
Mr. Waring: Stand aside.
Mr. Anderson: That is all.
Witness excused.

Mr. J. L. Hunt, a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waring:

Q. Your name is J. L. Hunt?
A. Yes, sir.
Q. Mr. Hunt, were you the conductor that was on this motor car that had this accident at Binghampton last September?

A. Yes, sir.

Q. Mr. Hunt, when your car reached the crossing at Binghampton, what did you do?

A. The first crossing? Well, I got out to flag the track like I always do.

Q. Well, was that the crossing where the accident happened, where the southbound train passed?

A. Well, I flagged the first one.

Q. That is the Belt crossing beyond there?

A. Yes, sir.

Q. I am not speaking about that. You had flagged that Belt crossing and gone on across."

A. Yes, sir.

Q. Then you came on down where the Illinois Central double tracks are?

A. Yes, sir.

Q. And you stopped there, the car stopped there?

60 A. Yes, sir.

Mr. Crabtree: I object to that.

The Court: Don't lead the witness, but that has been proved so many times—just state this man was the conductor of the street car on the day in question and when he reached the tracks of the Illinois Central he stopped his car.

Mr. Waring:

Q. Now, start from that time. Was there a southbound train passing?

A. Yes, sir; there was.

Q. Now, where were you standing when this southbound train was going by?

A. I was standing up near the front of the car, about even with the front end of the car.

Q. Were you on the car or off the car?

A. Off the car.

Q. On the ground, then, ready to flag?

A. Yes, sir.

Q. Mr. Hunt, when the southbound train passed, what did you do?

A. Well, after it passed I walked across the track looking north, across the first track.

Q. Why didn't you look south across the first track?

A. Well, because it was the southbound track.

Q. And the train had gone by?

A. Yes, sir.

Q. Now, after you had passed that southbound set of tracks, what, if anything else, did you do?

A. Well, I walked across that track and then as I started across the other track I turned my head south.

Q. Did you see anything coming?

A. No, sir; I did not.

Q. What did you do with reference to your car?
A. Well, after I turned my head—I turned my head as I started to walk across the last track. When I turned my head and started across I turned and signaled the motorman this way (illustrating).
Q. To come ahead?
A. Yes, sir.
Q. When did you first know there was a train or anything coming?
A. Coming north?
Q. Yes.
A. Not until after I had crossed the track and waved the car to come ahead.
Q. Not until after you had crossed the track and waved the car to come ahead?
61 A. Yes, sir.
Q. You were across and continued to walk on east, did you?
A. Yes, sir.
Q. To catch your car after it crossed?
A. Yes, sir.
Q. Mr. Hunt, what first attracted your attention and made you look—now wait a minute—when you crossed this set of tracks and looked south did you see a train then?
A. No, sir; none only the caboose of the other train.
Q. Of the other train that was going south?
A. Yes, sir.
Q. Was there dust around that crossing, or did you see any dust around that crossing?

Mr. Crabtree: I object to that method.
The Court: That is suggestive.
Mr. Waring: All right.

A. Yes, sir; there was some dust around there.

Mr. Waring: Don't answer that.
The Court: He has done answered it. Now, don't repeat the transgression.

Mr. Waring:

Q. Just describe the conditions there, Mr. Hunt.
A. I understood you to say to go ahead and answer.

The Court: That is all right.

Mr. Waring:

Q. When you crossed those tracks now, crossed the northbound tracks, did you look to see whether there was a train coming from the south or not?
A. Yes, sir.
Q. Could you see one?
A. No, sir.
Q. Then you motioned your car to come ahead?
A. Yes, sir.

Q. When did you first know or hear anything about a train coming?
A. After I had crossed my track and was waiting for my car.
Q. What called your attention to it?
A. Well, what called my attention to it was the hollering on the trailer.

Mr. Crabtree: What was that you say called your attention?
The Court: The hollering on the trailer.

Mr. Waring: People hollering. You heard people on the car or trailer, or whatever it was, hollering?
A. Yes, sir.
62 Q. Did you look then back to see what was the matter?
A. Yes, sir; I looked back.
Q. And where was the train then?
A. Well, at the time I looked back I did not see the train there. I turned around looking towards the trailer and as I looked back I saw the gates were open and saw some, I don't know how many, jumping. By that time the engine was right on the trailer.

The Court: You never did see the engine until it hit the trailer?
A. No, sir; it was right on the trailer.

Mr. Waring: When you saw the trailer the gates were open and people jumping out?
A. Yes, sir.
Q. Was there any engine there in sight when the people were jumping out?
A. I didn't see it.
Q. You don't know about the speed at which it came up there?
A. No, sir.
Q. You don't know whether the engine had a headlight on it?
A. No, sir.

Cross-examination.

By Mr. Anderson:

Q. Mr. Hunt, do you mean to say that you had walked from the front end of that motor car across both of those tracks and had gotten in the clear on the east side of the track when you heard the people hollering on the trailer?
A. Yes, sir; I do.
Q. And they was hollering so loud that you could hear them away over there and hear them distinctly; is that right? I say they were hollering so loud that you could hear them away across there and hear them distinctly?
A. Yes, sir; I could hear them.

The Court: Where was the car when you first heard the hollering where was the trailer when you first heard the hollering?
A. Well, the motor car, I suppose, was on the first track.
The Court: The motor car was on the first track?

A. In the first track, I mean the track that the train was coming on.

The Court: East track?

A. Yes, sir.

The Court: And the trailer was behind that?

A. Well——

63 The Court: Bound to have been behind it if it was pulling it?

A. Sure it was behind it, but I could not state the distance because I never noticed the car until about the time I looked back.

The Court: It was the distance from where you were to the motor car and the length of the motor car between that point and the trailer?

A. Yes, sir.

The Court: Go on.

Mr. Anderson:

Q. When you looked back you heard these people hollering and that attracted your attention and you looked back and the engine was right then on the trailer?

A. Yes, sir, I saw the trailer and the engine all at the same time.

Q. In other words, you never saw the engine until the engine and the trailer were coming right together?

A. That was the first I saw of the engine when the trailer was getting struck.

Q. What are you doing now?

Mr. Warner: That is objected to.

A. I am still working for the Street Railway Company.

Mr. Waring: I will ask your Honor to instruct the jury that that is not material.

The Court: I don't see that that is material one way or the other, a man just working for the street car company.

Mr. Waring: Mr. Anderson's idea is that the man ought to have been fired.

The Court: I don't think that question figures here.

Mr. Anderson: That is not my idea.

Witness excused.

Mr. Sam Awkey, a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waring:

Q. Your name is Sam Awkey?

A. Yes, sir.

Q. What is your business, Mr. Awkey?

A. Engineer.

Q. Mr. Awkey, were you a passenger upon a Raleigh Springs motor car last September when this accident happened?

A. Yes, sir.

64 Q. Whereabouts on this car were you?

A. I was standing in the vestibule.

Q. Is that the front or rear vestibule?

A. Front.

Q. In the front vestibule?

A. Yes, sir.

Q. With reference to where the motorman was standing where were you standing in that vestibule?

A. To his right?

Q. To his right?

A. Yes, sir.

Q. Were you in front or behind him?

A. Behind him.

Q. To the right and behind the motorman?

A. Yes, sir.

Q. Were the windows open in the vestibule?

A. Yes, sir; on one side.

Q. Do you remember the car coming up there and stopping to let this southbound train go by?

A. Yes, sir.

Q. Now, while your car was standing there were you talking to anybody?

A. Yes, sir.

Q. Who were you talking to?

A. Zeke Hughes.

Q. A Mr. Hughes?

A. Yes, sir.

Q. Were you observing or noticing this train as it went by?

A. Yes, sir; he and I were counting the cars as it went south.

Q. Where was the conductor, if you recall?

A. He was standing on the ground.

Q. Near the side of the car?

A. Yes, sir; side of the car.

Q. While you were standing there, Mr. Awkey, did you see or hear anything or hear a whistle of a train approaching from the south?

A. No, sir.

Q. If there had been an alarm whistle blown along there, was there anything to have kept you from hearing it?

A. No, sir.

The Court: How far were you from the train that was running by?

A. Sir.

The Court: How far were you from the train that was

65 running by?

A. Going south?

The Court: Yes.

A. Why, we was not over twenty-five feet, I guess.

The Court: Go ahead.

Mr. Waring:

Q. You were standing about twenty-five feet from the south-bound train?

A. Yes, sir.

Q. Of course, that train was making a considerable amount of noise?

A. Yes, sir.

Q. But do you think you could have heard a whistle of an engine coming?

A. Yes, sir.

Q. Mr. Awkey, when that train cleared the crossing, the south-bound train cleared the crossing, now, what, if anything, did the conductor do, or did you notice the conductor?

A. I never noticed the conductor?

Q. You never noticed the conductor?

A. No, sir; I didn't see him.

Q. Well, what did the motorman on your car do?

A. He started ahead and crossed the tracks.

Q. What was the first thing that attracted your attention to a train coming from the south?

A. Coming from the south? I heard the screams of some one.

Q. Now, during all of that time, you were right on the front platform of the car?

A. Yes, sir.

Q. On the right-hand side, south side of the car?

A. Yes, sir.

Q. And as your car went over these first tracks and upon these other tracks, you were standing in the same place?

A. Yes, sir.

Q. The first thing that attracted your attention then, you say, was a scream?

A. Yes, sir; somebody hollering.

Q. Well, now, did you look then and see the train?

A. Yes, sir.

Q. Mr. Awkey, when you saw this train, what did the motorman do?

A. Why, I suppose he put on his current. The car give a jerk.

Mr. Anderson: Wait a minute.

The Court: Don't state what you suppose.

66 Mr. Waring:

Q. You did not see the motorman do anything, did you?

A. No, sir.

Q. What did the car do?

A. The car give a sudden jerk ahead.

Q. A sudden jerk?

A. Yes, sir.

Q. At the time that this screaming happened and this car jerked ahead and you saw the train, the motor car was already on the track then, wasn't it?

A. Yes, sir.
Q. Now, before it got to the track, did you hear people hollering to stop; not to go on the track?
A. No, sir.
Q. Did anything of that sort happen, Mr. Awkey?
A. No, sir.
Q. Now, something happened to the car that caused it to jerk and go on ahead?
A. Yes, sir.
Q. Did you measure the distance afterwards—well, I will ask you first this: Did you see the train when it actually hit the trailer?
A. When it hit the trailer?
Q. Yes.
A. Yes, sir.
Q. It tore the trailer loose, didn't it, from the motor car?
A. Yes, sir.
Q. And dragged it and engine and how many box cars?
A. Derailed; I don't know, sir, how many.
Q. Were there several derailed?
A. Yes, sir; several of them.
Q. Box cars and engine turned over?
A. Yes, sir.
Q. And the engine carried the trailer up the track?
A. Yes, sir.
Q. About how far did it run before it was derailed?
A. About ninety steps from the street car line.

Cross-examination.

By Mr. Anderson:

Q. And the screaming of the passengers back in the car called your attention?
A. Sir?
Q. You say that the screaming of the passengers back in the car called your attention?
A. Yes, sir.

Mr. Anderson: Stand aside.
Witness excused.

67 Mr. D. A. Wood, a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Waring:

Q. State your name, please, sir.
A. Wood, D. A.; Woods I sign my name.
Q. D. A. Wood.
A. Yes, sir.
Q. Were you a passenger on a Raleigh Springs train last September when it had this accident out there at Binghampton?
A. Yes, sir; on the motor car.

Q. Whereabouts on the motor car were you?

A. I was standing in the front end, holding to the strap, about middleways.

Q. Do you recall the car coming up there and stopping and a southbound train passing and then the car starting again, do you not?

A. Yes, sir.

Q. Mr. Wood, at or about the time the car started ahead, did you hear anybody holler to him not to start, not to go ahead?

A. No, sir.

Q. Where was the car now when you first heard people hollering?

A. Well, I was standing about in the position I was in the car; I was about the center of the northbound track.

Q. And you were about the middle of the car?

A. No, sir; the position I was in the car; you see I was in the front end.

Q. Oh, you were in the front end of the car?

A. Front end of the motor car.

Q. Now, about how far were you from the front door of the motor car?

A. Well, I don't suppose I was over four feet.

Q. Two feet?

A. Four feet.

Q. Four feet, and when the first hollering took place you were right over the center of the track?

A. Yes, sir; that is the first I noticed of it.

Q. Up to that time had there been any commotion in the car; people hollering to the motorman not to go ahead?

A. Not that I heard.

Q. When you heard that commotion and were standing there, was that the first that you knew there was danger or the train or anything coming?

68 A. Yes, sir; when I heard the hollering.

Q. Now, Mr. Wood, when you looked, did you see the engine?

A. When they hollered I looked and saw the engine; never saw the engine until I heard the hollering.

Q. I will ask you to state whether or not—what was the condition of the crossing there, down at Broad street, with reference to whether there was dust, smoke or anything around there?

A. Well, that southbound train had raised a right smart of dust.

Q. Do you recall whether there was any smoke there?

A. I didn't notice about the smoke.

Q. With reference to where that dust was, where was this northbound engine when you first saw it?

A. Just about opposite the cement house.

Q. Mr. Wood, did you look at it as it came toward you?

A. Yes, sir.

Q. What kind of a headlight, if any, did it have on it?

A. I didn't notice any light only a small, dim light in the cab; I taken it to be in the cab.
Q. It looked like a small, dim light?
A. Yes, sir.
Q. You took it to be a light on the cab?
A. Yes, sir.
Q. How fast would you say that that train was coming?
A. I suppose she was going about twenty-five miles an hour; at least that.
Q. I didn't understand you?
A. At least twenty-five miles an hour, according to my judgment.
Q. And it was about the cement house when you first saw it? Your motor car, of course, got across; the car that you were on crossed the track?
A. Yes, sir.

Mr. Waring: You can cross-examine.

Cross-examination.

By Mr. Anderson:

Q. Mr. Wood, as I understand it, you were standing just inside of the door of the motor car?
A. Yes, sir.
Q. And standing up and holding to a strap?
A. Yes, sir.
Q. Standing up that way, you could not see out the window; see south without stooping over a little bit, could you?
69 A. No, sir; I had to stoop.
Q. You had to stoop over if you did see south, the windows up that way?
A. Yes, sir.
Q. And what called your attention to something being wrong was other passengers in the car that were screaming and hollering? The noise and the screaming and hollering in the car drew your attention to something that was wrong?
A. Yes, sir.
Q. And then you stooped down and looked and saw this train coming?
A. Yes, sir.

Redirect examination.

By Mr. Waring:

Q. At that time the car was on the track?
A. Yes, sir.

The Court: That is what he said. Stand aside.
Mr. Waring: I wanted to ask him another question.
The Court: Come back.

Mr. Waring:

Q. Mr. Wood, did you live beyond this place or live at Binghampton?

A. I lived beyond the National Cemetery.

Q. But this accident happened in the town of Binghampton, didn't it?

A. It is right on the line of Binghampton; I don't know where the corporation line or limit is there.

Mr. Waring: That is alleged in the declaration as a matter of fact. That is all.

Witness excused.

Mr. Waring: If your Honor please, this Dr. Terrell business, I have told Mr. Anderson about Dr. Terrell's bill.

Mr. Anderson: We admit that they paid his bill and are not and could not make any claim for that, and the bill was $200 and the Street Car Company paid it.

The Court: All right.

Mr. Waring: I am limited to four witnesses to the actual happening of the accident; I have put those four on.

The Court: Yes.

Mr. Waring: I wanted to reserve an exception to the court's limiting us as to the number of witnesses, for whatever that exception is worth; I want the record to show that the defendant offers some more witnesses.

The Court: Is it cumulative?

Mr. Waring: Yes, sir. The witnesses I have got will
70 testify along the same line that Mr. Woods did, as to the headlight of the engine, etc.

Mr. Anderson: I will admit they will testify to that.

The Court: It is cumulative he states.

Mr. Anderson: Well, being as he is excepting, I will just except to the court limiting me, too.

The Court: Well, the evidence would be cumulative, he says. Really I see but little contradiction in any material fact as to where the folks were and what was done.

Defendant rests.

This was all the evidence in the case.

During the argument to the jury, counsel for defendant read to the jury a portion of the plaintiff's declaration alleging the negligence on the part of the Illinois Central Railroad Company, attempting to show the jury what plaintiff's counsel thought the negligence of the Illinois Central Railroad was when they brought the suit, and the following thereupon occurred:

The Court: Colonel, I don't think that is proper. That case is dismissed. That is not evidence in the case.

Mr. Waring: It is not evidence, but I want to show what their contention was.

The Court: I shall tell the jury that, although they might find the Illinois Central was guilty of negligence, that would not excuse

you. They have a right to sue you, or either one or both of you. I don't think it is proper for you to read that declaration here.

Mr. Waring: All right, sir, defendant excepts.

The Court: He dismissed the case against the I. C. Railroad.

Thereupon counsel proceeded with their argument to the jury, after which the court charged the jury orally as follows:

71 *Charge of the Court.*

Gentlemen of the Jury: E. A. McCoy and S. C. Moore, as administrator of Ivy B. Douglass, have separately sued the Memphis Street Railway Company for $50,000 in each case for damages resulting from a collision, as is alleged, between a street car and a railway train of the Illinois Central Railroad in September, 1914.

The defendant files its answer and states that it is not guilty of the wrongs and injuries complained of, and that is the issue now that is presented to you to determine.

You are trying the two cases together because the injuries complained of are alleged to have resulted from the same accident, so that it would involve the same facts and the same witnesses to determine whether or not there is liability in the first place. If, under the evidence, the defendant is liable to one of these plaintiffs for the injuries he sustained, it is liable also to the other for the injury he sustained, so that, in determining the question of liability, you may consider them together. If you find liability in one case, you should find liability in the other. If you find non-liability in one case, you should find non-liability in the other, so that the question you will determine is whether or not, on the occasion in question, the negligence of the Street Railway Company proximately contributed to the injuries sustained by these plaintiffs.

A common carrier, such as the defendant Street Railway Company, is not an insurer of the safety of its passengers, but it owes to them the duty of exercising the highest degree of care and caution in and about the movement and handling of its trains and cars in order to safely transport them, and the question for your consideration in this case is whether or not the defendant company discharged their duty to Mr. Douglass, the intestate of the administrator, and Mr. McCoy, while they were passengers on the defendant's car.

Under the evidence and pleadings in this case, you are instructed that it was the duty of the conductor on defendant's street car, before he signaled the car ahead and across the Illinois Central Railroad tracks, to have exercised the highest degree of care and caution in ascertaining whether or not a train was approaching on the Illinois Central Railroad tracks, and it was his duty to have looked along the northbound track of the railroad for an approaching train, and, if one was approaching, to have seen it, unless you further find that his view down the track was cut off or so obscured by smoke or dust incident to the passing of the southbound Illinois Central
72 Railroad train that he could not see the train, and, if you so find, then it was the conductor's duty to have delayed signaling the street car ahead and across the railroad track for a reasonable

time, in order to allow the smoke -nd dust to settle, or to float out of the way so as not to obscure his view down the track, and, in this undertaking, to have exercised the highest degree of care and caution in determining whether a train was approaching or not, and to have done such other thing or things that a person would have done while in the exercise of the highest degree of care and caution under like conditions and circumstances.

Whether or not the defendant company discharged its duty on the occasion in question is for you to determine under all the evidence in the case and under the law as stated. If you find that it did exercise that high degree of care and caution as just indicated, and, notwithstanding that the deceased came to his death and Mr. McCoy was injured as the result of the accident, and the negligence of the defendant company did not proximately contribute to it, your verdict should be for the defendant.

Upon the other hand, if you find, from all the evidence, that the Street Railway Company did not exercise that high degree of care and caution, and did not discharge the duty which it owed to safely transport the deceased and Mr. McCoy as passengers, as the court has just stated, and that its failure to discharge that duty imposed upon it by law was the proximate cause of the death of the deceased and the injury to Mr. McCoy, then it would be liable and you should so find.

The plaintiffs had a right to sue the Street Railway Company alone or the Illinois Central Railroad Company alone, or both together. They may prosecute the suit against either one of them, and, if the one sued, the Street Railway Company in this case, was guilty of negligence on its part that contributed to the injuries, then they are liable for whatever injuries the plaintiffs sustained.

If you find for the defendant, then you need not go any further, but return your verdice that you find for the defendants in both cases.

Assuming, however, for the purpose of what shall follow in this charge that you have found for the plaintiffs; that is, that the defendant is liable to them for damages, then your next consideration would be in what amount should your verdict be in these cases, and, at this point, your consideration of the two cases separate on the question of the amount of damages. Each one must depend upon
73 its own evidence in that regard.

Generally speaking, you cannot figure out, as you would a sum of mathematics, the amount of damages that either one of these parties would be entitled to, if any, but you take the evidence before you in each case separately and determine each one for itself, and you should not allow the fact that you are trying them together to affect your judgment one way or the other as to the amount of damages in the respective cases. They must be considered from that viewpoint just as if they had been tried alone.

Now, in Mr. McCoy's case, if you find that the Street Railway Company is liable, then, in determining the amount of his verdict, you should take into consideration the man's age at the time of the accident, his state of health, his habits of industry, or otherwise, his

habits of sobriety or otherwise, his earning capacity, what he was earning, his expectancy of life, the suffering and pain that he has endured the expenses he has been at in and about being cured which he is responsible for and must pay or has paid, and then, in your sound judgment, say what would compensate him. He has sued for $50,000. That is no evidence that he is entitled to that sum or any sum. It is an amount beyond which you cannot go for the reason that he has fixed that limit himself, but you may find for any sum less than that which, in your judgment, under all the evidence, would compensate him for the injuries sustained.

So, as to the case of S. C. Moore, administrator of Mr. Douglass, he would be entitled to recover such a sum as, in your judgment would compensate for the loss sustained. To determine that you would take the age of Mr. Douglass at the time of the accident and his death, his habits of industry and sobriety or otherwise; I should say soberness or otherwise; his earning capacity or what he was capable of earning, and then say, under all the facts and circumstances, what would reasonably compensate those who relied upon him for their support because of his loss. He has sued for $50,000, but that, as I said before, is not evidence that he is entitled to recover that or any other sum, but you cannot go beyond that sum, but you may find for the administrator in the sum of $50,000 or any amount less than that, that would reasonably compensate.

Now, if you should come to the question of damages, in ascertaining or determining the amount to be allowed, you should not permit your sympathies or your passion or prejudice to control your judgment. So far as the court and the jury are concerned, we are
74 trying the rights of these people upon the cold facts and the law, and if we should permit our judgments to be controlled by any other thing than the facts and the law, why we do ourselves an injustice and we do the parties against whom we should find an injustice, so that you should pursue it as sensible, clear-headed, disinterested business men, men of affairs, and say what your verdicts and amounts should be.

If you find for the defendant, you will just state, "We find for the defendant in both cases."

If you find for the plaintiffs, you will state, "We find in favor of the plaintiff" in a given case and the amount of the damages found in the respective cases, and sign it by your foreman.

Is there anything further, Mr. Anderson?

Mr. Waring: If your honor please, the defendant desires to except to that part of your honor's charge that it was the duty of the conductor to wait for the dust and smoke to disappear before signaling the car. It is our position that it is for the jury to say whether, having no reason to expect a train at that time, he was guilty of negligence.

Now, there is another portion of your honor's charge in which I may have misunderstood the court. I am excepting for what it is worth. If your honor did not say that, of course, I will withdraw it. I understood the court, in charging as to whether the plaintiff had a right to sue the Street Railway and the Illinois Central, to

state that in this case the Street Railway Company, having been guilty of negligence which was the proximate cause of the accident, they could sue them.

The Court: No, I said "if."

Mr. Waring: Then I withdraw that exception. I was not clear as to whether your honor charged that or not.

The defendant now desires to tender these instructions to the court, six of them, and they are duplicated in both cases so as to save time.

The Court: The court charges you that you cannot consider, in this case, anything that you may have known or heard in connection with any other litigation or controversies that may have arisen about this accident.

The court charges you that you cannot allow any damages for mental anguish, there being no evidence to sustain that element of damages in the case of Moore against the Street Railway, but there was evidence of that kind in the case of McCoy against the
75 railroad and that will be a proper subject for your consideration in that case.

You are charged that the conductor of the train had a right to assume that those in charge of any railroad train approaching would do so in a proper manner and exercise reasonable care under the circumstances.

Mr. Waring: The record may show that the defendant excepts to the action of the court in not giving the other special instructions in both cases?

The Court: Yes, sir.

Said special instructions so refused by the court, are as follows:

I.

The court charges you that if you find from the evidence that this conductor, when he appproached this crossing, heard no alarm, whistle or bell and saw no train, and that he walked out upon the crossing and still heard no alarm and heard no train approaching, and had no reason to suppose that there would be a train approaching and coming through the fog of dust which was down about Broad street, and had a further reason to suppose that, if there was a train coming, it would have a light upon it sufficient to appear through the fog of dust, and, if you further believe that, in the discharge of that degree of care placed upon him by law, he was not negligent in what he did, then, in that event, the plaintiff cannot recover and your verdict must be for the defendant. (Declined.)

II.

The court charges you that in determining whether or not this conductor used the degree of care that he was required to use under the law, and, in passing upon whether or not he was negligent in what he did, I charge you that you should consider the circum-

stances surrounding this accident, and the question as to whether or not the conductor had a right, from the usual operation of trains, to expect a northbound train to approach from the south. (Declined.)

III.

I charge you, in passing upon whether or not this conductor was negligent in signaling his car across while his view was partially obstructed by the dust and smoke from the southbound train which had collected and was settling about the crossing at Broad street, you are to consider whether or not the conductor had any reason to expect or believe, from the usual operation of trains at that place, that there would be a train approaching from the south and through this fog of dust, and I charge you further that the conductor
76 would have a right to believe and assume, and to act upon the assumption that, if a train was approaching, it would be equipped with a reasonable light so that he could see it and it would give warning of its approach. (Declined.)

The defendant's exceptions to the charge of the court, and its exceptions to the court's action in refusing to give the special instructions tendered in the cause, as above set forth, were made while the jury was still in the box and before the case had been given to them for their consideration.

Thereupon, after all of the above exceptions were made and noted, the court directed the jury to retire from the court room and consider their verdict. The jury then retired and considered its verdict in this cause and case of Moore, Admr., vs. Mfs. St. Ry. Co., which had been submitted to them at the same time, and under the same evidence and charge of the court, and, after so considering its verdict, returned to the court room and reported a verdict in favor of the plaintiff in the sum of twenty thousand ($20,000.00) dollars.

Judgment: Verdict Favor Plaintiff for $25,000.00 *and Costs.*

Entered June 17th, 1915.

Be it remembered, that on this day came the plaintiff, S. C. Moore, administrator, by his counsel, and the defendant, Memphis Street Railway Company, by its counsel, and thereupon came a jury of good and lawful men, to wit: G. A. Richardson, L. Gottschall, J. M. Hall, Henry Soehmer, J. N. Nealis, H. C. Wilson, Jr., A. D. Burke, Chas. E. Lodge, W. A. McLaughlin, H. L. Pickering, J. H. Massey and S. P. Crawford, who, being duly elected, impaneled and sworn to well and truly try the issues joined, and a verdict render; and who, having heard the testimony of the witnesses, argu-
77 ment of counsel and the charge of the court, did return in open court their verdict, whereby they say they find the issues joined in favor of the plaintiff and against the defendant and

fix the plaintiff's damages at twenty-five thousand ($25,000.00) dollars.

It is therefore considered by the court that the plaintiff, S. C. Moore, administrator, have and recover of the defendant, Memphis Street Railway Company, the sum of twenty-five thousand ($25,000.00) dollars, together with the costs of the cause, for which execution will issue.

The defendant, through its counsel, thereupon entered its motion for a new trial, which was in writing, and in words and figures as follows.

Motion for New Trial.

Filed June 23d, 1915.

Now comes the defendant, the Memphis Street Railway Company, and moves the court for a new trial in this cause, wherein a verdict has been rendered against it in the sum of $25,000 and costs on the seventeenth day of June, 1915, and for grounds of motion says:

I.

The court erred in not sustaining defendant's plea to the jurisdiction of the court to try the cause.

II.

Because the court had no jurisdiction to try the controversy involved in this lawsuit, in that there was no diversity of citizenship that would give the court jurisdiction.

III.

The court erred in requiring the defendant, over its objection, to try the issues involved in this case at the same time and before the same jury that was trying the issues involved in an entirely
78 different case, to wit, the case of E. O. McCoy v. Memphis Street Railway Company.

IV.

The court erred in not allowing the defendant to cross-examine the plaintiff's witness Pool in order to test the correctness of the witness' testimony that a whistle had been blown by the northbound train at a certain point, the holding of the court being that whether the whistle was blown or not was immaterial because the failure to blow the whistle would not relieve the defendant from its negligence.

This was error because as a part of the plaintiff's case the court had permitted the plaintiff to prove by the witness Pool that the proper signals had been given on the approach of the northbound

train, and if this was material in support of the plaintiff's case the defendant should have been permitted to have cross-examined the witness to test the truth of this statement.

V.

Th court erred in, after having declined to allow the defendant to cross-examine the witness Pool as to the blowing of the whistle, not withdrawing from the jury all the evidence of the witness Pool to the effect that the whistle was blown. This should have been done because if, as stated by the court, the defendant could not cross-examine the witness Pool to test the accuracy of his statement that the whistle was blown because it was not material upon the question of the defendant's negligence then it should not have gone to the jury but should have been withdrawn upon defendant's motion.

VI.

The court erred in excluding the answer of the witness Pool to the effect that after he saw the car approaching the track that neither he nor the engineer or any one else blew an alarm signal to call the motorman's attention to the fact that the train was coming.

This evidence was competent and material, as one of the allegations of negligence against the defendant was that after warning had been given of the approach of the train by its whistle the defendant's crew negligently allowed their car to go upon the track.

VII.

The court erred in declining to allow the defendant to introduce other witnesses sustaining its contention to the effect that no alarm was sounded by the train; that it did not have a sufficient headlight for defendant's agents to see it approaching; that it was run-
79 ning at a reckless and negligent rate of speed, and that its approach was obscured by smoke and dust. The court limited the defendant upon the proof of these issues to the testimony of its crew of two and two disinterested witnesses, whereas defendant had a large number of disinterested passengers who were upon its car to sustain this contention.

VIII.

The court erred in declining to allow defendant's counsel during the course of the argument to read from the declaration filed in the case wherein plaintiff had alleged and set up certain grounds of negligence as against the Illinois Central Railroad Company, alleging failure to have a proper headlight, failure to sound alarm whistles, reckless rate of speed. This was proper and legitimate argument going to show that the plaintiff's theory at the time the suit was brought coincided with the defendant, the Memphis Street Railway Company's version of what caused the accident and wherein the real responsibility lay.

IX.

Because the court erred in charging the jury as follows:

"Under the evidence and pleadings in this case you are instructed that it was the duty of the conductor on defendant's street car before he signaled the car ahead and across the Illinois Central Railroad tracks to have exercised the highest degree of care and caution in ascertaining whether or not a train was approaching on the Illinois Central Railroad tracks, and it was his duty to have looked along the northbound track of the railroad for an approaching train, and if one was approaching to have seen it, unless you further find that his view down the track was cut off or obscured by smoke or dust incident to the passing of the southbound Illinois Central train that he could not see the train, and if you so find, then it was the conductor's duty to have delayed signaling the street car ahead and across the railroad track for a reasonable time in order to allow the smoke and dust to settle, or to float out of the way so as not to obscure his view down the track, and in this undertaking to have exercised the highest degree of care and caution in determining whether a train was approaching or not; and to have done such other thing or things that a person would have done while in the exercise
80 of the highest degree of care and caution under like conditions and circumstances."

This was error because it could not be said as a matter of law that it was the conductor's duty under the circumstances developed in this record to wait until the fog and dust had subsided from the crossing, but it was a question of fact to be decided by the jury as to whether or not under the circumstances, no train being due there at that time and no light appearing through the darkness, and no signal having been blown the conductor was guilty of negligence in going ahead, and it was error to say to the jury as a matter of law that it was his duty to wait there.

X.

Because the court erred in declining to give defendant's special request No. 1, which was as follows:

"The court charges you that if you find from the evidence that this conductor, when he approached this crossing, heard no alarm, whistle or bell and saw no train, and that he walked out upon the crossing and still heard no alarm and heard no train approaching, and had no reason to suppose that there would be a train approaching and coming through the fog of dust which was down about Broad street, and had a further reason to suppose that, if there was a train coming, it would have a light upon it sufficient to appear through the fog of dust, and if you further believe that in the discharge of that degree of care placed upon him by law, he was not negligent in what he did, then in that event the plaintiff cannot recover and your verdict must be for the defendant."

XI.

Because the court erred in declining to give defendant's special request No. 2, which was as follows:

"The court charges you that in determining whether or not this conductor used the degree of care that he was required to use under the law, and in passing upon whether or not he was negligent in what he did, I charge you that you should consider the circumstances surrounding this accident, and the question as to whether or not the conductor had a right, from the usual operation of trains, to expect a northbound train to approach from the south."

XII.

Because the court erred in declining to give defendant's special request No. 3, which was as follows:

81 "I charge you that in passing upon whether or not this conductor was negligent in signaling his car across while his view was partially obstructed by the dust and smoke from a southbound train which had collected and was settling about the crossing at Broad street, you are to consider whether or not the conductor had any reason to expect or believe, from the usual operation of trains at that place, that there would be a train approaching from the south and through this fog of dust, and I charge you further that the conductor would have a right to believe and assume, and to act upon the assumption, that if a train was approaching, it would be equipped with a reasonable light so that he could see it and it would give warning of its approach."

XIII.

Because the court erred when the calendar was being set for trial in calling counsel for plaintiff's attention to the fact that in a previous case involving the same accident, to wit, in the case of Illinois Central Railroad Company vs. Memphis Street Railway Company, the court had held that the Illinois Central Railroad Company was guilty of no negligence, and in suggesting that if counsel persisted in seeking to recover against the Illinois Central Railroad Company and required that company to bring up a lot of witnesses that he might be taxed with the costs of those witnesses.

XIV.

Because the verdict in this case is grossly excessive, in that -- evinces passion, prejudice and caprice upon the part of the jury.

XV.

Because there is no evidence to sustain the verdict.

Wherefore the defendant moves the court to set aside the verdict for the above reasons and grant it a new trial.

THE MEMPHIS STREET RAILWAY COMPANY,
By ROANE WARING, *Attorney.*

Upon the hearing of defendant's motion for a new trial in this cause the trial court stated, that he overruled all the grounds of the said motion with the exception of the ground as to the excessiveness of the verdict; that was in his judgment, excessive, and that he would sustain the motion for a new trial unless plaintiff would accept a remit-tur of $7,500.00, thus reducing the verdict from $25,000.00 to $17,500.00.

82 Thereupon, the plaintiff accepted said remit-tur and reduced the verdict to $17,500.00, in accordance with the suggestion of the court, and, thereupon the court overruled the defendant's motion for a new trial.

Order: Overruling Motion for New Trial.

Entered June 26th, 1915.

Be it remembered, that this case came on this the twenty-sixth day of June, 1915, to be heard before the Hon. John E. McCall, judge, upon the motion of defendant to set aside the verdict and grant it a new trial herein. And upon a consideration thereof, the court is of opinion that said motion is not well taken except on the ground that the verdict rendered herein is excessive, the court being of opinion that unless seven thousand five hundred ($7,500.00) dollars of the verdict is remitted, that same should be set aside.

Thereupon, plaintiff through his counsel, elected to accept said remit-itur of seven thousand five hundred ($7,500.00) dollars, and it is therefore ordered, adjudged and decreed that the motion for a new trial be and it is hereby overruled and disallowed; and that the plaintiff, S. C. Moore, have and recover of the defendant, Memphis Street Railway Company, the sum of seventeen thousand, five hundred ($17,500.00) dollars, together with the costs of the cause, for which execution may issue.

To which action of the court in overruling and disallowing its motion for a new trial the defendant excepted, and now tenders this its bill of exceptions, which is signed and sealed by the court, and ordered to be made a part of the record, this nineteenth day of July, 1915, and herewith prays an appeal in the nature of a writ of error in accordance with its assignment of errors on file.

JNO. E. McCALL, *Judge.*

O. K.
ANDERSON & CRABTREE.
O. K.
ROANE WARING.

83 *Petition for Writ of Error.*

Filed July 19th, 1915.

The defendant, The Memphis Street Railway Company, in the above styled case, feeling itself aggrieved by the verdict of the jury and the judgment entered herein on the seventeenth day of June, 1915, all of which will more in detail appear from the assignment of errors which is filed with this petition, comes now, by Roane Waring, one of its attorneys of record, and petitions the court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Sixth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made, granting or fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that, upon the giving of such security, all further proceedings in this court may be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Sixth Circuit; and your petition will ever pray.

ROANE WARING,
Attorney for Defendant.

Assignment of Errors.

Filed July 19th, 1915.

Now comes the defendant, The Memphis Street Railway Company, and in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred upon the trial of the cause, to wit:

I.

The court erred in not sustaining defendant's plea to the jurisdiction of the court to try the cause.

II.

Because the court had no jurisdiction to try the controversy involved in this lawsuit, in that there was no diversity of citizenship that would give the court jurisdiction.

84 III.

The court erred in requiring the defendant, over its objection, to try the issues involved in this case at the same time and before the same jury that was trying the issues involved in an entirely different case, to wit, the case of E. O. McCoy v. Memphis Street Railway Company.

IV.

The court erred in not allowing the defendant to cross-examine the plaintiff's witness Pool in order to test the correctness of the witness' testimony that a whistle had been blown by the northbound train at a certain point, the holding of the court being that whether the whistle was blown or not was immaterial because the failure to blow the whistle would not relieve the defendant from its negligence.

This was error because as a part of the plaintiff's case the court had permitted the plaintiff to prove by the witness Pool that the proper signals had been given on the approach of the northbound train, and if this was material in support of the plaintiff's case the defendant should have been permitted to have cross-examined the witness to test the truth of this statement.

V.

The court erred in, after having declined to allow the defendant to cross-examine the witness Pool as to the blowing of the whistle, not withdrawing from the jury all the evidence of the witness Pool as to the effect that the whistle was blown. This should have been done because if, as stated by the court, the defendant could not cross-examine the witness Pool to test the accuracy of his statement that the whistle was blown because it was not material upon the question of the defendant's negligence then it should not have gone to the jury but should have been withdrawn upon defendant's motion.

VI.

The court erred in excluding the answer of the witness Pool to the effect that after he saw the car approaching the track that neither he nor the engineer or any one else blew an alarm signal to call the motorman's attention to the fact that the train was coming.

This evidence was competent and material, as one of the allegations of negligence against the defendant was that after warning had been given of the approach of the train by its whistle the defendant's crew negligently allowed their car to go upon the track.

85

VII.

The court erred in declining to allow the defendant to introduce other witnesses sustaining its contention to the effect that no alarm was sounded by the train; that it did not have a sufficient headlight for defendant's agents to see it approaching; that it was running at a reckless and negligent rate of speed, and that its approach was obscured by smoke and dust. The court limited the defendant upon the proof of these issues to the testimony of its crew of two and two disinterested witnesses, whereas defendant had a large number of disinterested passengers who were upon its car to sustain this contention.

VIII.

The court erred in declining to allow defendant's counsel during the course of the argument to read from the declaration filed in the case wherein plaintiff had alleged and set up certain grounds of negligence as against the Illinois Central Railroad Company, alleging failure to have a proper headlight, failure to sound alarm whistles, reckless rate of speed. This was proper and legitimate argument going to show that the plaintiff's theory at the time the suit was brought coincided with the defendant, the Memphis Street Railway Company's version of what caused the accident and wherein the real responsibility lay.

IX.

Because the court erred in charging the jury as follows:

"Under the evidence and pleadings in this case you are instructed that it was the duty of the conductor on defendant's street car before he signaled the car ahead and across the Illinois Central Railroad tracks to have exercised the highest degree of care and caution in ascertaining whether or not the train was approaching on the Illinois Central Railroad tracks, and it was his duty to have looked along the northbound track of the railroad for an approaching train, and if one was approaching to have seen it, unless you further find that his view down the track was cut off of obscured by smoke or dust incident to the passing of the southbound Illinois Central train that he could not see the train, and if you so find, then it was the conductor's duty to have delayed signaling the street car ahead and across the railroad track for a reasonable time in order to allow the smoke and dust to settle, or to float out of the way so as not to obscure his view down the track, and in this undertaking to have exercised the
86 highest degree of care and caution in determining whether a train was approaching or not; and to have done such other thing or things that a person would have done while in the exercise of the highest degree of care and caution under like conditions and circumstances."

This was error because it could not be said as a matter of law that it was the conductor's duty under the circumstances developed in this record to wait until the fog and dust had subsided from the crossing, but it was a question of fact to be decided by the jury as to whether or not under the circumstances, no train being due there at that time and no light appearing through the darkness, and no signal having been blown the conductor was guilty of negligence in going ahead, and it was error to say to the jury as a matter of law that it was his duty to wait there.

X.

Because the court erred in declining to give defendant's special request No. 1, which was as follows:

"The court charges you that if you find from the evidence that this conductor, when he approached this crossing, heard no alarm,

whistle or bell and saw no train, and that he walked out upon the crossing and still heard no alarm and heard no train approaching, and had no reason to suppose that there would be a train approaching and coming through the fog of dust which was down about Broad street, and had a further reason to suppose that, if there was a train coming, it would have a light upon it sufficient to appear through the fog of dust, and if you further believe that in the discharge of that degree of care placed upon him by law, he was not negligent in what he did, then in that event the plaintiff cannot recover and your verdict must be for the defendant."

XI.

Because the court erred in declining to give defendant's special request No. 2, which was as follows:

"The court charges you that in determining whether or not this conductor used the degree of care that he was required to use under the law, and in passing upon whether or not he was negligent in what he did, I charge you that you should consider the circumstances surrounding this accident, and the question as to whether or
87 not the conductor had a right from the usual operation of trains, to expect a northbound train to approach from the south."

XII.

Because the court erred in declining to give defendant's special request No. 3, which was as follows:

"I charge you, in passing upon whether or not this conductor was negligent in signaling his car across while his view was partially obstructed by the dust and smoke from a southbound train which had collected and was settling about the crossing at Broad street, you are to consider whether or not the conductor had any reason to expect or believe, from the usual operation of trains at that place, that there would be a train approaching from the south and through this fog of dust, and I charge you further that the conductor would have a right to believe and assume, and to act upon the assumption, that if a train was approaching, it would be equipped with a reasonable light so that he could see it and it would give warning of its approach."

XIII.

Because the court erred when the calendar was being set for trial in calling counsel for plaintiff's attention to the fact that in a previous case involving the same accident, to wit, in the case of Illinois Central Railroad Company vs. Memphis Street Railway Company, the court had held that the Illinois Central Railroad Company was guilty of no negligence, and in suggesting that if counsel persisted in seeking to recover against the Illinois Central Railroad Company and required that company to bring a lot of witnesses that he might be taxed with the costs of those witnesses.

XIV.

Because the verdict in this case is grossly excessive, in that — evinces passion, prejudice and caprice upon the part of the jury.

XV.

Because there is no evidence to sustain the verdict.

Wherefore the defendant, The Memphis Street Railway Company, prays the action of the court.

ROANE WARING,
Attorney for the Memphis Street Railway Company.

88 *Bond on Writ of Error.*

Filed July 19th, 1915.

Know all men by these presents, that the Memphis Street Railway Company as principal and Roane Waring of Memphis, Tennessee, as surety, are held and firmly bound unto S. C. Moore, administrator, in the full and just sum of $250.00, to be paid to the said S. C. Moore, administrator, his certain attorneys, successors or assigns to which payment, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this sixteenth day of July, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately, in the District Court of the United States for the Western District of Tennessee, in a suit pending in said court between S. C. Moore, administrator, and the Memphis Street Railway Company, a judgment was rendered against the defendant, the Memphis Street Railway Company, and in favor of the said plaintiff, S. C. Moore, administrator, and the defendant, the Memphis Street Railway Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the aforesaid court and a citation directed to the said S. C. Moore, administrator, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said Circuit, on the eighteenth day of August, 1915.

Now, the conditions of the above obligation are such that if the Memphis Street Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fails to make said plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

THE MEMPHIS STREET RAILWAY COMPANY,
By ROANE WARING, *Its Attorney.*
ROANE WARING, *Surety.*

89 *Order: Allowing Writ of Error.*

Entered July 19, 1915.

This nineteenth day of July, 1915, came the defendant by its attorney, and filed herein and presented to the court its petition for a writ of error, together with its assignment of error, also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had which may be proper in the premises.

On consideration whereof, the court does allow the writ of error, upon the defendant giving bond according to law, in the sum of two hundred and fifty ($250) dollars.

Supersedeas Bond.

July 19, 1915.

Know all men by these presents, that we, the Memphis Street Railway Company, as principal, and the Aetna Accident and Liability Co. of Hartford, Conn., as surety, are held and firmly bound unto S. C. Moore, administrator, in the full and just sum of twenty thousand dollars, lawful money of the United States of America, to be paid to the said S. C. Moore, administrator, for the payment of which, well and truly to be made, we hereby bind ourselves jointly and severally, and our joint and several successors and assigns, by these presents.

Signed by us, sealed with our seals, and dated at Memphis, Tennessee, this sixteenth day of July, A. D. 1915.

Whereas, the above named principal, having obtained a writ of error to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, holden at Cincinnati, in the State of Ohio, to reverse the judgment of the above entitled suit against said principal by the District Court of the United States for the Western District of Tennessee.

Now, therefore, the condition of the foregoing obligation is such that if the above named principal shall prosecute its said
90 writ of error to effect, and answer all costs and damages if it fail to make its plea and the said writ of error good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

THE MEMPHIS STREET RAILWAY COMPANY,
By ROANE WARING,
Its Attorney.

[SEAL.]

THE AETNA ACCIDENT AND LIABILITY CO.,
By J. J. MORRISON,
Resident Vice-President.

Attest:
E. L. PITMAN,
Resident Assistant Secretary.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Western Division of the Western District of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Memphis Street Railway Company, plaintiff in error, and S. C. Moore, administrator, defendant in error, a manifest error hath happened, to the great damage of the said Memphis Street Railway Company, plaintiff in error, as by its complaint appears.

We, being willing that that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at the
91 city of Cincinnati, in the State of Ohio, on the eighteenth day of August, A. D. 1915, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, and the seal of the said District Court, this the nineteenth day of July, A. D. 1915, and the 140th year of American Independence.

[SEAL.]

A. G. MATHEWS,
Clerk District Court of the United States,
Western District of Tennessee,
By E. J. HEIDEL,
Chief Deputy Clerk.

Allowed by:
McCALL, *Judge.*

This writ came to hand August 2nd, 1915, at Memphis, Tennessee and I served same on S. C. Moore, administrator by reading to and leaving with Anderson and Crabtree, attorneys for said S. C. Moore, administrator, at Memphis, Tennessee, August 2nd, 1915, a true copy of this writ as herein commanded.

Fees $2.00.

S. H. TREZEVANT,
U. S. Marshal,
By W. T. BOND, *Deputy.*

Citation.

The United States Circuit Court of Appeals for the Sixth Circuit.

No. 1554. At Law.

S. C. MOORE, Administrator,
vs.
MEMPHIS STREET RAILWAY COMPANY.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To S. C. Moore, Administrator, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the
92 Sixth Circuit, to be holden at the city of Cincinnati, Ohio, in said Circuit on the eighteenth day of August next, pursuant to a writ of error granted by the District Court of the United States for the Western District of Tennessee, wherein the Memphis Street Railway Company is plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States of America, this the nineteenth day of July, 1915, and of the Independence of the United States the 140th year.

[SEAL.] JNO. E. McCALL, *Judge.*

Service of the within citation and receipt of copy thereof admitted this second day of August, 1915.

ANDERSON & CRABTREE,
Attorneys for Defendant in Error.

This writ came to hand August 2nd, 1915, at Memphis, Tennessee, and I served same on S. C. Moore, administrator, by reading to and leaving with Anderson and Crabtree, attorneys for said S. C. Moore, administrator, at Memphis, Tennessee, August 2nd, 1915, a true copy of this writ as herein commanded.

Fees $2.00.

S. H. TREZEVANT,
U. S. Marshal.
By W. T. BOND, *Deputy.*

Order: Extending Time to Complete Transcript of Record on Appeal.

Entered August 17th, 1915.

In this case, it appearing to the court that additional time is necessary in which to complete the transcript of record and pro-
93 ceedings had herein, and for filing same in the United States Circuit Court of Appeals, for this, the Sixth Judicial Circuit; It is, therefore, hereby ordered by the court that the time be, and is, extended sixty days for completing and filing said transcript of the record and proceedings had herein in the United States Circuit Court of Appeals, and the same additional time allowed the appellants within which to make the deposit of $35.00 required by Rule 16 of said Appellate Court.

Certificate.

THE UNITED STATES OF AMERICA:

Sixth Judicial Circuit, District Court of the United States, Western District of Tennessee.

I, A. G. Mathews, clerk of the District Court of the United States, for the Western District of Tennessee, do hereby certify that the papers hereto attached, are a full, true, perfect and correct copies of the originals of record and proceedings had therein including original writ of error and citation in said court as the same now appears of record and upon the files in my office, in the following cause, to wit:

No. 1554.

S. C. MOORE, Administrator, Plaintiff,
vs.
MEMPHIS STREET RAILWAY CO., Defendant.

In testimony whereof, I have hereunto written my name and affixed the seal of said court, at my office in the city of Memphis, Tennessee, this seventh day of October, A. D. 1915, and of the Independence of the United States the 140th year.

[SEAL.] A. G. MATHEWS, *Clerk.*

94 I, John E. McCall, a judge of said court, de hereby certify that A. G. Mathews, whose genuine signature appears to the foregoing certificate is, and was at the date of the same clerk of said court and that his attestation is in due form.

JNO. E. McCALL,
Judge of the District Court of the United States for the District Aforesaid.

Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Entry—Cause Argued and Submitted. (May 5, 1916—Before Knappen and Denison, C. J. J. and Sessions, D. J.)

These causes are argued together by Mr. Roane Waring on behalf of plaintiffs in error, by Mr. Caruthers Ewing on behalf of J. W. Bobo, Adm. of Walter Owens, deceased, and by Mr. Ike W. Crabtree on behalf of S. C. Moore, Adm. and E. O. McCoy, defendants in error, and are submitted to the court.

Judgment.

(Filed June 6, 1916.)

Error to the District Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

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Opinion.

(Filed June 6, 1916.)

Filed Jun- 6, 1916. Wm. C. Cochran, Clerk.

Nos. 2790—2842—2843.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2790.

MEMPHIS STREET RAILWAY CO., Plaintiff in Error,
vs.
J. W. BOBO, Administrator of the Estate of Walter Owens, Deceased, Defendant in Error.

No. 2842.

MEMPHIS STREET RAILWAY CO., Plaintiff in Error,
vs.
S. C. MOORE, Administrator of the Estate of Ivy B. Douglas, Deceased, Defendant in Error.

No. 2843.

MEMPHIS STREET RAILWAY CO., Plaintiff in Error,
vs.
E. O. McCOY, Defendant in Error.

Error to the District Court of the United States for the Western District of Tennessee.

Submitted, May 5, 1916.

Decided, June 6, 1916.

Before Knappen and Denison, Circuit Judges, and Sessions, District Judge.

SESSIONS, *District Judge:*

The Memphis Street Railway Company (defendant) operates an interurban electric railway from the City of Memphis to the Town of Raleigh, running east and west through the Town of Binghamton where it crosses at right angles the double tracks of the Illinois Central Railroad. On September 17, 1914, at about 6:30 p. m., a train of defendant's cars, consisting of a motor car and a trailer, approached this crossing from the west and stopped to allow a long southbound freight train to pass upon the west set of the Illinois Central tracks. While the freight train was passing,

the conductor of the electric train stood upon the ground near the front of the motor car. Immediately after the southbound train had cleared the crossing, the conductor walked east across both tracks and signaled his train to come ahead. At that time his view south was obstructed by a cloud of dust and smoke from the southbound freight train. In obedience to the signal so given the motorman started his cars and when the trailer was upon the east Illinois Central tracks it was struck by a northbound freight train and many passengers were killed and injured. Walter Owens and Ivy B. Douglas were killed and E. O. McCoy was seriously injured. Hence these suits.

In each of the two suits brought by administrators, the jurisdiction of the United States District Court for the Western District of Tennessee is challenged upon the alleged ground of want of the requisite diversity of citizenship of the parties. The defendant is a citizen of Tennessee. The administrators, J. W. Bobo and S. C. Moore, are both non-residents of Tennessee and citizens of other states. A statute of Tennessee (Chapter 501, Acts of 1903) provides: "That whenever a non-resident of the State of Tennessee qualifies in this State as the executor or administrator of a person dying in or leaving assets or property in this State, that for the purpose of suing or being sued, he shall be treated as a citizen of this State." The insistence of the Railway Company is that, by virtue of this statute, "when a non-resident of Tennessee qualifies as administrator of an estate of a resident of Tennessee, that non-resident becomes a citizen of Tennessee." This contention cannot be sustained. It must be assumed that the State Legislature by this statute intended to fix the status of non-resident executors and administrators as litigants in the courts of Tennessee and did not intend to interfere with rights which are granted by the Federal Constitution and the Acts of Congress. Doubtless, the State Legislature could have denied to non-residents the right or privilege to act as executors or administrators of the estates of deceased residents of the State, Re Mulford, 217—Ill. 242; 1 L. R. A. (N. S.) 341 and note, but no attempt has been made so to do. On the contrary, the right of a non-resident to act as administrator of an estate in Tennessee is expressly recognized by this legislation. No attempt is made to convert an actual non-resident into a citizen of Tennessee, or to provide for the revocation of the letters of administration of a non-resident administrator in case he avails himself of his constitutional right to bring suit in the proper court of the United States.

In each of these cases the administrator is acting under permission and authority granted to him by the state and is a citizen of another state. No question is raised as to his right to administer on the decedent's estate. It is settled that the jurisdiction of the Federal Courts depends upon the personal citizenship of the parties to the record and not upon the citizenship of the parties whom they represent. Rice vs. Houston, 13 Wall., 66; Amory vs. Amory, 95 U. S., 186; Mexican Cen. Ry. Co. vs. Eckman, 187—U. S., 429; Continental Ins. Co. vs. Rhoads, 119 U. S., 237; C. H. & D.

R. Co. vs. Thiebaud (C. C. A. 6), 114 Fed. Rep. 918, 922; Bishop vs. B. & M. R. R., 117 Fed. Rep. 771.

It is also settled that the jurisdiction of a Federal Court arising from diversity of citizenship of the parties to the suit cannot be impaired or annulled by a state statute. Hess vs. Reynolds, 113—U. S., 73, 77; Ellis vs. Davis, 109 U. S., 485, 498; Hyde vs. Stone, 20 How., 170, 175; Harrison vs. St. L. & San Francisco R. R. 232 U. S., 318; Barrow Steamship Co., vs. Kane, 170 U. S., 100, 111; Herndon vs. C. R. I. & P. Ry. Co., 218 U. S., 135; Madisonville Traction Co. vs. Mining Co., 196 U. S., 239, 253; Cable vs. U. S. Life Ins. Co., 191 U. S., 288, 306; Donald v. Philadelphia, etc. Co. decided by the Supreme Court May 22, 1916.

Coming then to the merits of the cases: The alleged errors in the trials all cluster about the question of whether, under the evidence in each case, the court would have been justified in directing a verdict for the plaintiff as to the negligence and consequent liability of the defendant. The question of the negligence of the conductor of this train at the time of the accident was submitted to the jury, but under instructions which required the jury to find that he was negligent if "his view down the track was cut off or was so obscured by smoke and dust incident to the passage of the southbound Illinois Central Railroad Company train that he could not see the train" and if he did not delay "signaling the street car ahead for a reasonable time to allow the smoke and dust to settle, rise or float out of the way so as not to obstruct his view down the track." The evidence shows beyond dispute that the conductor's view down the track to the south was temporarily obscured and obstructed by the dust and smoke from the train which had just passed, that but for the dust and smoke he could have seen the approaching train if he had looked, that he did not wait for the dust and smoke to pass away before signaling the street car to come upon the crossing, and that he did not see the approaching northbound train until the accident was inevitable. Hence the effect of the instructions given was a directed verdict against the defendant upon the question of its liability.

The defendant rested its defense upon the theory that the street car conductor had good reasons to believe, from the usual operation of trains at that place, that there would be no train approaching from the south at that time, and had a right to assume that, if a train was coming, its engine would be equipped with a proper headlight and it would give warning of its approach by bell or whistle or both, and that, if he acted upon such belief and assumption and used reasonable care, he was not negligent in signaling the car to cross the tracks without waiting for the dust and smoke to clear away. This theory was embodied in several requested instructions to the jury which were refused.

Defendant's contention entirely ignores the radical and fundamental difference between the degree of care for his own safety required of the user of a highway at a railroad crossing and that imposed upon a carrier for the protection of its passengers. The law exacts from the former the use of reasonable care only, while it demands from the latter the exercise of the greatest and highest

degree of care and caution approved by human knowledge and experience and consistent with the nature, extent and operation of its business. Indianapolis & St. L. R. Co. vs. Horst, 93 U. S., 291; Pennsylvania Co. vs. Roy, 102 U. S., 451; N. Y., N. H. & H. R. Co., vs Lincoln, 223 Fed. Rep. 896; Pittsburgh Rys. Co. vs. Givens, 211 Fed. Rep., 885, 888; Ramjak vs. Austro-American S. S. Co., 186 Fed. Rep., 417; Irvine vs. D. L. & W. R. Co., 184 Fed. Rep., 664; Cavin vs. Southern Pacific Co., 136 Fed. Rep., 592; Railroad vs. Kuhn, 107 Tenn., 106; 4 Ruling Case Law, 1144 et seq.

The street car conductor had in his keeping the lives and safety of the passengers upon his train. The railroad tracks which he was compelled to cross were a plain warning of danger. He knew that trains might be running upon those tracks at any time. He also knew that the cloud of dust and smoke which obstructed his view to the south would be scattered and dissipated in a few moments. By the exercise of even a moderate degree of care, caution and diligence he could have known of the approach of the northbound train and thus have prevented an appalling disaster. Whatever might be the effect of his own negligence—if the conductor were here seeking to recover damages from the Illinois Central Railroad Company for injuries to himself (McCrory vs. C. M. & St. P. Ry. Co., 31 Fed. Rep. 531; N. Y. S. W. R. Co. vs. Thierer, 209 Fed. Rep. 316; C. & N. W., Ry. Co. vs. Andrews, 130 Fed. Rep. 65, 73 and cases there cited), it is certain that, in signaling the street cars to cross the railroad tracks without waiting for the dust and smoke to clear away and without making sure whether another train was approaching, he was, as a matter of law, guilty of such negligence as to render his employer liable for the injuries resulting therefrom to the passengers in his charge. The concurring negligence, if any, of the Illinois Central Railroad Company and its servants does not relieve this defendant from liability to these plaintiffs.

Complaint is made of what is claimed to have been an undue restriction of the cross examination of the fireman of the Illinois Central train who was a witness for the plaintiff in one of the cases. The subject upon which the witness was being interrogated was whether the locomotive whistle was blown for the crossing and, if so, when and where. The ground had already been fully covered in the cross examination of the witness and, if the excluded questions and answers were at all material, the trial judge acted well within his discretion in preventing mere repetition of previous testimony.

The judgment in each case is affirmed.

Motion to Stay Mandate.

(Filed June 29th, 1916.)

Petitioner, The Memphis Street Railway Company, respectfully shows that on the — day of — this honorable court overruled and disallowed its assignments of error filed herein; wherein it was sought to have this court reverse the action of the United States Court for the Western District of Tennessee.

Petitioner desires to file a petition for certiorari in the Supreme Court of the United States seeking to have that court reverse the action of this honorable court, and accordingly, has in preparation its petition. Said petition cannot be presented until the next session of the Supreme Court, which begins on the second Monday of October.

Petitioner, therefore, respectfully petitions this court to stay the mandate from this court to the District Court of the United States for the Western District of Tennessee for the Western Division until its petition for certiorari can be presented to the Supreme Court at Washington at its October Session.

THE MEMPHIS STREET RAILWAY COMPANY,
By ROANE WARING, *Its Attorney.*

Personally appeared before me, Roane Waring, who on oath says that he is the attorney for The Memphis Street Railway Company in the above petition, and that the allegations in the same are true.

You are hereby notified that we will on Thursday, June 22nd, 1916, apply to the United States Circuit Court of Appeals for the Sixth Circuit, or some judge thereof, for a stay order, staying the mandate from that court in the above case until a petition for certiorari can be presented to the Supreme Court of the United States.

ROANE WARING,
Attorney for the Memphis Street Railway Company.

Notice of the above accepted this June 28th 1916.
MILTON J. ANDERSON,
Att'y for S. C. Moore, Adm.

Order Staying Mandate.

(Filed June 30, 1916.)

Ordered, upon motion of plaintiff in error, that mandate of this court be stayed until and including October 16, 1916, on condition

that plaintiff in error shall file in the Supreme Court petition for writ of certiorari on or before August 1, 1916, and thereafter present same to the Supreme Court at the earliest opportunity.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Memphis Street Railway Co. vs. S. C. Moore, Adm., etc. No. 2842, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 26th day of July, A. D. 1916.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 7/26/16. W. C. C., Clk.]

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Memphis Street Railway Company is plaintiff in error, and S. C. Moore, Administrator of the Estate of Ivy B. Douglas, deceased, is defendant in error, No. 2842, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of
107 the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twentieth day of October, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS,
For the Sixth Circuit, ss:

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 8th day of January A. D., 1917, there was filed in my office a stipulation in the above entitled case in the following words, towit:

United States Circuit Court of Appeals, Sixth Circuit.

No. 2842.

THE MEMPHIS STREET RAILWAY COMPANY, Plaintiff in Error,
vs.
S. C. MOORE, Administrator, Defendant in Error.

It is hereby stipulated that the transcript already filed in the Clerk's office of the Supreme Court of the United States, with the

petition for the writ of certiorari, be taken as a return to said writ, dated the 6 day of Jan'y, 1917.

ROANE WARING,
Counsel for The Memphis Street Railway Company.
IKE W. CRABTREE,
Counsel for S. C. Moore, Administrator.

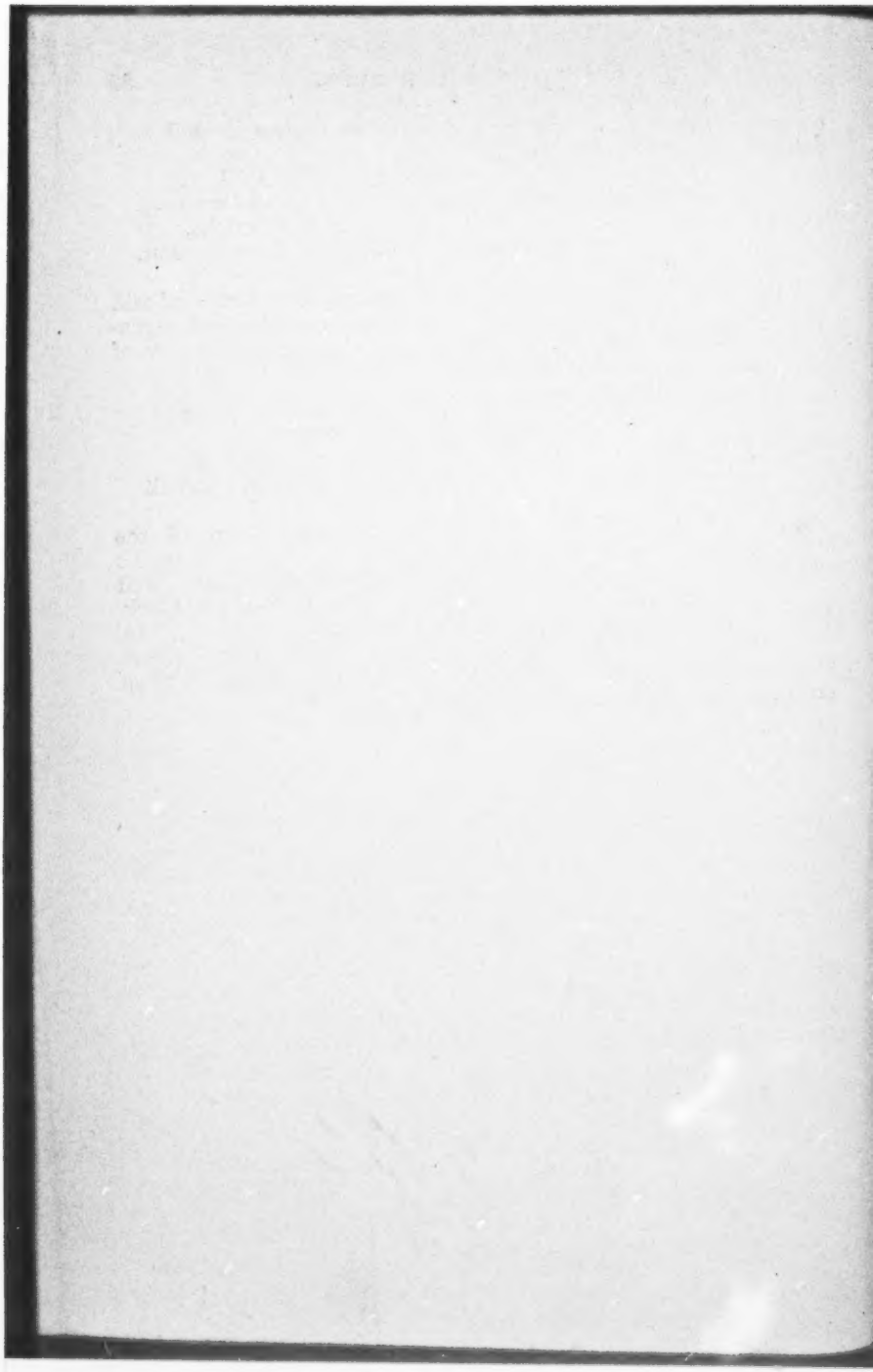
I further certify that the above is a true and correct copy of said stipulation and of the whole thereof. Witness my official seal, signature and the seal of said Circuit Court of Appeals at the city of Cincinnati in said circuit this 8th day of January A. D., 1917.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

108 [Endorsed:] File No. 25453. Supreme Court of the United States. No. 623, October Term, 1916. Memphis Street Railway Company vs. S. C. Moore, Administrator, etc. Writ of Certiorari. Filed Jan. 4, 1917. Wm. C. Cochran, Clerk.

109 [Endorsed:] File No. 25453. Supreme Court U. S., October Term, 1916. Term No. 623. Memphis Street Railway Company, Petitioner, vs. S. C. Moore, Administrator, etc. Writ of certiorari and return. Filed January 9, 1917.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

MEMPHIS STREET RAILWAY CO.,
Petitioner,
vs. No. 622

J. W. BOBO, Administrator of the Estate of
Walter Owens, Deceased,
Respondent.

And—

MEMPHIS STREET RAILWAY CO.,
Petitioner,
vs. No. 623

S. C. MOORE, Administrator of the Estate of
Ivy B. Douglass, Deceased,
Respondent.

PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF SAME.

LUKE E. WRIGHT,
ROANE WARING,
Counsel for Memphis Street Railway Company.

S. C. TOOF & CO., PRINTERS, MEMPHIS

LIST OF AUTHORITIES.

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G

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LIST OF AUTHORITIES—Continued.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

MEMPHIS STREET RAILWAY CO.,
Petitioner

vs.

J. W. BOBO, Administrator of the Estate of Walter Owens, Deceased,
Respondent.

And—

MEMPHIS STREET RAILWAY CO.,
Petitioner

vs.

S. C. MOORE, Administrator of the Estate of Ivy B. Douglass, Deceased,
Respondent.

PETITION FOR CERTIORARI.

To the Honorable Chief Justice
and Associate Justices of the Supreme
Court of the United States:

Your petitioner, Memphis Street Railway Company, respectfully represents, that it was made defendant in the District Court of the United States

for the Western District of Tennessee in the above cases, which were suits for personal injuries, resulting in death. The suits grew out of the same accident.

That it is a corporation organized and existing under and by virtue of the laws of Tennessee. (Bobo, Rec. pp. 1-13; Moore, Rec. p. 1.) That the accident out of which the law suits grew happened in Tennessee.

That both of the deceased were citizens of Tennessee (Bobo, Rec. p. 14; Moore Rec., p. 13), and that the administrators, who are the respondents in this petition and in whose names the suits were brought, both qualified and were acting under authority of Letters of Administration issued by a Probate Court of Tennessee. (Bobo Rec., p. 1; Moore Rec., pp. 12, 13.)

The sole ground upon which these suits were brought in a Federal Court was, that the Administrators personally were non-residents of Tennessee, one of them being a citizen of Arkansas, and the other a citizen of Mississippi. (Bobo Rec., p. 13; Moore Rec. 12,13.)

Petitioner challenged the jurisdiction of the United States Court for the Western District of Tennessee on the ground that there was no diversity of citizenship. Petitioner relied upon a statute of Tennessee, which provided that when a non-resident undertook

to act as an administrator by appointment of the courts of Tennessee, for the purpose "of suing and being sued, he shall be treated as a citizen of Tennessee."

> Chapter 501, Acts of Gen'l Assembly of Tennessee, 1903.

It was contended by petitioner that the right was clearly within the State to prescribe conditions under which non-residents could become administrative officers under the probate laws of the State, and to require, if in its judgment it was advisable, that for the purpose of suing and being sued that they should be deemed citizens of the State.

It was insisted that a non-resident has no inherent right to enter a State and be appointed an administrator of an estate. It was clearly within the right of the State to exclude such non-resident from qualifying as administrator at all, or to require as a condition precedent to the issuance of Letters of Administration to him, that he submit to the jurisdiction of the State courts. (Authorities cited in brief.)

Petitioner differentiated between an act of a State Legislature placing restrictions around, and making conditions precedent to the right of a non-resident to become an officer of a State Court where he has no such inherent right, and upon the one hand, and a State statute seeking to curtail the right of non-residents to seek the jurisdiction of a Federal Court when they come into a State to do business that the

State has no authority to exclude them from transacting.

The District Court sustained its jurisdiction, and the cases went to trial upon their merits, and resulted in verdicts against petitioner aggregating $27,500.00. Upon appeal to the United States Circuit Court of Appeals for the Sixth Circuit, petitioner again raised the jurisdictional question, and that Court, in an opinion delivered by District Judge Sessions, overruled petitioner's objection to the jurisdiction, and sustained the jurisdiction.

It is from this ruling of the learned Circuit Court of Appeals that we seek to remove these cases.

Your petitioner believes that the aforesaid judgment of the Circuit Court of Appeals, in sustaining the jurisdiction of the Federal Court for the Western District of Tennessee, is erroneous, and that this Honorable Court should require the said cases to be certified to it for its review and determination, in conformity to the Act of Congress in such cases made and provided.

WHEREFORE, Your petitioner respectfully prays, that a writ of certiorari may be issued out of, and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, demanding the said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record, and all the proceedings of said Circuit

Court of Appeals in the said cases therein entitled, Memphis Street Railway Company vs. J. W. Bobo, Administrator of the Estate of Walter Owens, Deceased, *and* Memphis Street Railway Company, vs. S. C. Moore, Administrator of the Estate of Iva B. Douglass, Deceased, Numbers 2790 and 2842, respectively, to the end that said cases may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress entitled "AN ACT TO ESTABLISH THE CIRCUIT COURTS OF APPEAL, AND TO DEFINE AND REGULATE IN CERTAIN CASES THE JURISDICTION OF THE COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES." Approved March 3, 1891, or that your petitioner may have such other or further relief in the premises as to this Court may seem proper and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals in said cases, and every part thereof, may be reversed by this Honorable Court;

And your petitioner will ever pray.

Counsel.

STATE OF TENNESSEE,
COUNTY OF SHELBY.

Roane Waring, being duly sworn, says he is one of the counsel for Memphis Street Railway Company, Petitioner, and that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

Roane Waring

Subscribed and sworn to before me by Roane Waring, this the 28th day of July, A. D. 1916.

W. H. Berry

Notary Public, Shelby County, Tennessee.

IN THE

Supreme Court of the United States

MEMPHIS STREET RAILWAY COMPANY,
Petitioner,
vs.

J. W. BOBO, Administrator of the Estate of Walter Owens, Deceased,

And

MEMPHIS STREET RAILWAY COMPANY,
Petitioner,
vs.

S. C. MOORE, Administrator of the Estate of Ivy C. Douglass, Deceased.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The sole and only question raised by the petition for certiorari in these cases is whether or not in law there was a diversity of citizenship between the petioner, Memphis Street Railway Company, who was the defendant below, and the respondents, the administrators, who were the plaintiffs below.

Petitioner is a Tennessee corporation. The accident out of which the law suits grew happened in Tennessee. The persons killed for whose benefit the administrators sued, were citizens of Tennessee. Both administrators were appointed and were acting by virtue of letters of administration issued by the Probate Court of Shelby County, Tennessee. They personally were citizens of Mississippi and Arkansas, and upon this ground sought the jurisdiction of the Federal Court.

At the outset of this brief we want to concede, so as to put at rest that question at least, that upon questions of diversity of citizenship, the citizenship of the administrator or executor, rather than the citizenship of the deceased, governs in determining whether or not there is a diversity of citizenship.

Rice v. Houston, 13 Wall. 66;
Amory v. Amory, 95 U. S. 186;
Mexican Central R. R. v. Eckman, 187 U. S. 429;
Continental Insurance Co. v. Rhodes, 119 U. 237.

We do not rely upon the personal citizenship of the deceased to sustain our contention that there is no diversity of citizenship. It is our insistence that for the purpose of these suits both of these administrators qualifying and acting under the laws of Tennessee and under the requirements of that law, which are made conditions precedent to their right

to qualify, are citizens of Tennessee. We rely upon a Tennessee statute so providing.

Chapter 501, Acts 1903.

A non-resident of a state has no inherent right to qualify and act as an administrative officer of that state. It is clearly within the power of the state to prohibit a non-resident from qualifying or acting as administrator or executor, and likewise is it within the power of the state to place limitations about his right to act, or to fix conditions precedent to his acting. This was conceded by the learned Circuit Court of Appeals, and is sustained by the authorities.

In in re Mulford, 1 L. R. A. (N. S.) 341, it is said:

> "An administrator is an officer of the state, deriving all of his authority from the state."

Statutes prohibiting the appointment of non-residents as administrators or executors are constitutional and valid.

Whitaker v. Wright, 35 Ark. 511;
Re Cotter, 54 Cal. 215;
Re Beech, 63 Cal. 458;
Re Stevenson, 72 Cal. 164, 13 Pac. 404;
Re Muersing, 103 Cal. 587, 37 Pac. 520;
Re Donovan, 104 Cal. 623, 38 Pac. 456;
Re Weed, 120 Cal. 634, 53 Pac. 30;
Re Kelley, 122 Cal. 379, 55 Pac. 136;
Re Gordon, 142 Cal. 125, 75 Pac. 672;
Strong v. Dignan, 207 Ill. 385, 99 Am. St. Rep. 225, 69 N. E. 909;
Chouteau v. Burlando, 20 Mo. 482;
Re Stewart, 18 Mont. 597, 46 Pac. 806;

State ex rel. Lancaster v. Woody, 20 Mont. 413, 51 Pac. 975;
Re Watson (Mont.), 78 Pac. 702;
Holladay v. Holladay, 16 Or. 147, 19 Pac. 81;
Hecht v. Carey (Wyo.), 78 Pac. 705;
Rice v. Tilton (Wyo.), 80 Pac. 828.

The power of the state to limit the right of administration to citizens of that state is recognized by this Court in the case of Rice v. Houston, 13 Wall. 66, where it is said:

> "It is to be presumed the absence of an averment in the pleadings to the contrary, that Houston when appointed administrator, was a citizen of Kentucky, and if so, the appointment was legal, for the laws of Tennessee do not forbid the probate courts of that state to entrust a citizen of another state with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee."

At the time of that decision (1871) the legislature of Tennessee had placed no restriction around the rights of non-residents to qualify as administrators and had fixed no conditions precedent to their right to serve.

Since that time and by an act of the General Assembly of Tennessee in 1903, the right of a non-resident to act as administrator by appointment from the courts of Tennessee has been restricted, and now when a non-resident qualifies as the administrator of the estate in Tennessee, he, for the purpose of suing and being sued, becomes a citizen of Tennessee.

His status as such is fixed by the statute law of Tennessee, and his compliance with this statute is a condition precedent to his right to qualify.

Chapter 501 of the Acts of the Tennessee Legislature of 1903 provides as follows:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That whenever a non-resident of the State of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, that for the purposes of suing and being sued, he shall be treated as a citizen of this state, and in case it is desired by any citizen of this state to sue said administrator or executor in his official capacity for any debt or demand, due or owing to any citizen of this state, from his testator or intestate, that, in case of the inability of the officer in whose hands process is placed, to find said administrator or executor in the state, that notice of said suit, served upon the Clerk of the County Court of the county, wherein said party qualified as administrator or executor, shall be sufficient notice to bring said administrator or executor before the court or justice issuing said process; provided, said Clerk notify said executor or administrator of such notice served upon him by United States mail."

Such statute is clearly constitutional and is not in conflict with the provisions of the Federal constitution granting equal privileges and immunities to the citizens of the several states, for the reason that

there is no inherent right in the resident of one state to go into a foreign state and demand his appointment as a probate officer of that state.

A state may clearly decline to confer official power, such as the administration of estates, upon the residents of other states, and such deprivation is not denying to that non-resident any privilege or immunity protected to him by the constitution of the general government. This is conceded in the opinion of the learned Circuit Court of Appeals.

We call the Court's attention to a very careful consideration and discussion of this question by the Supreme Court of Illinois in the case of in re Mulford, 1 L. R. A. (N. S.) 341 (344-347), where it is said:

> "The 'privileges and immunities' which are protected by the constitutional inhibition concern the personal and private rights of the citizen, such as his right to acquire and possess property, to pursue ordinary callings, and secure happiness and safety, etc., and do not include within their meaning the right to hold office. People ex rel Akin v. Leoffler, 175 Ill. 585, 51 N. E. 785. The state may decline to confer official power on residents of other states without depriving such non-residents of any 'privilege' or 'immunity' protected by the constitution of the general government, or of 'liberty' or 'property' within the meaning of those words as used in our state constitution. A non-resident can have no property right in the fees provided by

law to be paid as compensation for the performance of the duties of an office created by or existing by virtue of the statutes of this state. 'Liberty,' as the term is used in the constitutional provision, includes freedom from servitude and unlawful restraint, the right to pursue any ordinary calling, trade or employment, and to acquire property, etc., thereby, but does not include any supposed right of a non-resident to receive an appointment to a position created by the general laws of the state for the purpose of carrying into effect legislation affecting the state and its people.

The power to control property of a deceased person, to the end that it shall be applied to the payment of the just debts of the decedent, for he protection of those who are peculiarly dependent upon him, and who may otherwise become burdens on the public, and the remainder to be transmitted to the persons or to the purposes the testator desired it to go or be applied to, rests in the state in its sovereign capacity. In exercising this governmental function the state has the clear right to call to its aid and to invest with official power only such persons as are residents within its territorial limits. No non-resident enjoys the 'privilege or immunity' to participate as an officer in the administration of the affairs of the state, nor had he any right of 'liberty or property' in the fees or emoluments of any such office or public position.''

The learned Circuit Court of Appeals, while recognizing the right of a state to control the appointment of administrators, and to place restrictions and limitations around them, decided this jurisdictional

question against us upon the ground that the Act of the Tennessee Legislature violated the Constitution of the United States when it undertook to impair the right of a non-resident to seek the jurisdiction of a Federal Court, even though that non-resident was acting as a state officer by sufferance conditioned upon his becoming a citizen of that state.

The learned Circuit Court of Appeals said:

> "It is also settled that the jurisdiction of a Federal Court arising from the diversity of citizenship of the parties to the suit cannot be impaired or annulled by a state statute."

An examination of the authorities cited by the Circuit Court of Appeals from this Court clearly show that in those cases the Court was not dealing with a statute in any way similar to the statute that is now before this Court.

Those authorities simply sustained the proposition that a state cannot by legislation force citizenship upon a non-resident in order to defeat federal jurisdiction, when that non-resident is in the state transacting business that inherently he has a right to transact.

The distinction is plain and clear. In the case we have before us now no non-resident has an inherent right to go into the courts of Tennessee and seek to be made an administrator of an estate, and in denying him the right to administer unless as a condition precedent thereto he submits to the obliga-

tions of citizenship in a qualified sense to the extent of suing and being sued, is not depriving him of any rights guaranteed by the Federal Constitution.

The principle of law controlling in this case is similar to the principle announced by this Court in Insurance Company v. Prewitt, 202 U. S. 246, which sustained a state statute of Kentucky denying a non-resident insurance company the privilege of doing business within the state unless it would first agree to submit to the local jurisdiction of the state courts. The constitutionality of this satute was upheld upon the ground that a non-resident insurance company had no inherent right to come into the State of Kentucky and do business, and consequently a statute limiting its right and placing restrictions around it denied it no immunities guaranteed by the Federal Constitution.

Among the cases cited by the learned Circuit Court of Appeals sustaining its position in holding the statute in question unconstitutional is the case of Harrison v. St. Louis & San Francisco Railroad Company, reported in 232 U. S. 318. In that case was involved a statute passed by the State of Oklahoma, providing, "That the domicile of any person, firm or corporation conducting a business in person, by agent, through an office, or otherwise transacting business within the State of Oklahoma * * * shall be for all purposes deemed and held to be in the State of Oklahoma." The statute further provided for the revocation of license or charter to do busi-

ness within the state of any firm, person or corporation conducting business within the state who shall claim in any court residence in another state.

The St. Louis & San Francisco Railroad Company, doing business in the State of Oklahoma, sought to remove a case to the Federal court, and thereupon the authorities of Oklahoma sought to revoke its license. Upon an injunction bill brought in the Federal court enjoining such revocation this court held the statute unconstitutional.

Manifestly it was, for no state would have the right to deny to the citizen of another state his inherent right to transact business in common with citizens of the state unless he should first become a citizen of that state. In this case it was said:

> "While the provisions of the statute are dependent one upon the other and are unified in the sense that they all are components of a common purpose, that is, tend to the realization of one and the same legislative intent, its provisions nevertheless, for the purpose of analysis, are plainly twofold in character, that is, one, the compulsory citizenship and domicile within the state which the first section imposes and the other the prohibition which the statute pronounces against any assertion in a court of the existence of any other citizenship and domicile than that which the statute ordains and means and penalties provided for sanctioning such prohibition. Although theoretically, the first would seem to be more primary and fundamental of the two, since the second, after all, consists but of

methods provided for making the first operative, the second from the point of view we are examining in the primal consideration, since it directly deals with the assertion in a state court of a right to remove and provides the mechanism which was deemed to be effectual to render the assertion of such right impossible. In other words, the difference between its two provisions is that which exists between an attempt on the one hand to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal status incompatible with the existence of the right and, on the other hand, the formulation of such prohibitions and the establishment of such penalties against the attempt to avail of the Federal right as to cause it to be impossible to assert it. Coming then to consider the statute from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground of diversity of citizenship in the contingency contemplated, punished by extraordinary penalties any assertion of a right to remove under the laws of the United States, and attempts to divest the Federal courts of their power to determine, if issue arise on the subject, whether there is a right to remove. Indeed, the statute goes much further, since when an application to remove is made, in order to prevent a judicial consideration of its merits even by the state court, it in effect commands the judge of such court on the making of the application to refuse the same and certify the fact that it was made to a state executive officer to the end that such officer should without judicial action strip the petitioning corporation of its right to do business, be-

> sides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the status is thus properly appreciated, nothing need be further said to manifest its obvious repugnancy to the Constitution or to demonstrate the correctness of the decree of the Court below."

Clearly such statute was a discrimination against non-residents in a right which they enjoyed in common with the citizens of the state, to engage in any lawful business therein.

The distinction between the Oklahoma statute and the statute now before this Court is manifest. A non-resident of Tennessee has no inherent right to enter the state and seek to become an officer of administration under the laws of the State of Tennessee.

The distinction between the two classes of statutes is clearly pointed out further on in the opinion. In that case it was insisted that the Oklahoma statute was constitutional under the same authority that had declared the non-resident insurance company statute of Kentucky constitutional. (Mutual Life Insurance Company v. Prewitt, 202 U. S. 246.) There it was argued that if the State of Kentucky had a right to provide for the revocation of a license of a non-resident insurance company doing business in that state if it should seek the jurisdiction of the Federal court, that the Oklahoma authorities had the right to do likewise.

Mr. Justice White, in the opinion, clearly makes the distinction that the St. Louis & San Francisco Railroad Company and its agents were doing an interstate business in the State of Oklahoma, by an inherent right which they enjoyed, with the citizens of that state, to transact any lawful business there; whereas, upon the other hand, the right to exclude a foreign insurance company from doing an intrastate business in Kentucky was clearly within the rights of the Kentucky legislature.

In Harrison v. St. Louis & San Francisco Railroad Company, *supra,* the language of this Court is, in drawing the distinction, as follows:

> "The proposition that the constitutionality of the statute and the action taken under it, is supported by the decisions in Doyle v. Continental Insurance Company, 94 U. S. 535, and Security Company v. Prewitt, 202 U. S. 246, is, we think, plainly unfounded. Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the state of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a state of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the state to exert its lawful power. But that the application of those cases to a situation where complete power in a state over the subject dealt with does not exist, has since been so repeatedly passed upon as to cause the question not to be open. Western

> Union Telegraph Company v. Kansas, 216 U. S. 1; Pullman Company v. Kansas, ib. 56; Textbook Company v. Pigg, 217 U. S. 91; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, and Herndon v. C., R. I. & P. Ry., 218 U. S. 135."

An examination of the other authorities cited by the learned Circuit Court of Appeals will show that they are dealing with similar conditions as in Harrison v. St. Louis & San Francisco Railroad Company. The distinction between that line of cases and the case now before the Court, we submit, is plain and marked.

In Mutual Life Insurance Company v. Prewitt, 202 U. S. 246, the Kentucky statute which was held valid was as follows:

> "Before authority is granted to any foreign insurance company to do business in the state, it must file with the commissioner a resolution adopted by its board of directors, consenting that service of process upon an agent of such company in this state, or upon the Commissioner of Insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if the company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of

> this state in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state."

That statute was before this Court in a case in which the insurance company was enjoining an effort to revoke its license upon the ground that the statute was unconstitutional in that it sought to restrict the right of a non-resident to redress in Federal courts. This court upheld the constitutionality of that statute upon the ground the State of Kentucky had complete authority to say whether or not a non-resident insurance company could come within the state and do business, and having this authority it could provide for the revocation of its license should that non-resident company seek the jurisdiction of a Federal court.

We quote from a portion of the opinion of the Court by Mr. Justice Peckham, as follows:

> "A state has the right to prohibit a foreign corporation from doing business within its borders, unless such prohibition is so conditioned as to violate some provision of the Federal Constitution. Among the later authorities on that proposition are Hooper v. California, 155 U. S. 648; Allgeyer v. Louisiana, 165 U. S. 578, 583; Orient Insurance Company v. Daggs, 172 U. S. 557; Waters-Pierce Oil Company v. Texas, 177 U. S. 28; New York Life Insurance Company v.

Cravens, 178 U. S. 389, 395; Hancock Mutual Life Insurance Company v. Warren, 181 U. S. 73."

Again, further on in the opinion the Court says:

"Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the companies deny is the right of a state to enact in advance that if a company remove a case to a Federal Court its license shall be revoked.

We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into Federal Court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle case we think is good."

By analogy this case is similar to the one now before this Court. If the State of Kentucky, having the right to say whether or not a non-resident insurance company could come into the state and do business, could legally provide for the revocation of its charter if it sought the aid of the Fed-

eral courts, for the same reason can the State of Tennessee, having clearly the right to prohibit altogether a non-resident from qualifying as administrator within the state, enact a statute providing that when a non-resident does qualify he shall for all purposes connected with the administration, and especially for the purpose of suing and being sued, be deemed a citizen of Tennessee, and sue in the courts of Tennessee.

Under the authority of Mutual Insurance Company v. Prewitt, we submit the act of the Tennessee legislature now before this court is constitutional and effective, and for the purpose of suing and being sued, the administrators in this case should be treated as citizens of Tennessee.

Construction of the Act by the Tennessee Supreme Court.

This act has already been construed in its broadest sense by the Supreme Court of Tennessee in the case of Southern Railroad v. Maxwell, 113 Tenn. 464, where the court held that a non-resident administrator suing in the courts of Tennessee was a citizen of Tennessee for the purposes of that suit and was therefore permitted to sue upon the pauper's oath, a privilege only accorded to citizens of the state. In that case it is said:

> "The first assignment necessitates a construction of chapter 501, page 1344, of the Acts of 1903.

The question made upon this act in the present case is whether a non-resident administrator of the estate of a person dying in this state, or leaving assets or property in the state, and appointed by the courts of this state, can prosecute a suit in this state on the pauper oath. The defendant in error is a citizen of the state of Virginia, but qualified as administrator here, and brought the present suit upon the pauper oath. In the court below a motion was made to dismiss the suit on this ground, or for want of a prosecution bond, which motion was overruled by the court. To test the correctness of this ruling, the first assignment of error was filed.

In order to a proper understanding of this matter, it will be necessary to make a short review of previous legislation on the subject.

Section 4928 of Shannon's Code (Section 3192 of the Code of 1858) provides that, except in suits brought for false imprisonment, malicious prosecution, slanderous words, and divorce suits brought by males, 'any person' may commence an action on taking the oath prescribed for poor persons. This was held to apply to non-residents as well as to residents, in Lisenbee v. Holt, 1 Sneed 42, but not to apply to administrators, either resident or non-resident, in Smith v. Railway Company, 89 Tenn. 664, 14 S. W. 842. Then chapter 133, page 313, Acts of 1897, was passed, which provided that 'any personal representative of the estate of any deceased person in this state' might prosecute suits upon the pauper oath. This was broad enough to cover both resident and non-resident administrators of the estates of persons dying

in this state, qualified here. Then chapter 126, page 197, Acts of 1901, was passed, which provided that no person 'not a citizen or resident of the State of Tennessee' should be permitted to bring suits under the pauper oath. In Southern Railway Company v. Thompson, 109 Tenn. 343, 71 S. W. 820, this act was enforced against a plaintiff suing in his own right, and held to apply to pending suits. In Fawcett v. Railway Co., 5 Cates 246, 81 S. W. 839, decided July 25, 1904, it was held that the Act of 1901 applied to non-resident administrators and prevented them from bringing suits upon the pauper oath.

In this state of the law, with the exception that the last mentioned case had not then been decided, the Act of 1903, above referred to, was passed. This read as follows: 'That whenever a non-resident of the State of Tennessee qualifies in this state as the executor or administrator of a person dying in or leaving assets or property in this state, that for the purpose of suing and being sued he shall be treated as a citizen of this state, and in case it is desired by any citizen of this state to sue said administrator or executor in his official capacity for any debt or demand, due or owing to any citizen of this state, from his testator or intestate, that, in case of the inability of the officer in whose hands process is placed, to find said administrator or executor in this state, that notice of said suit, served upon the clerk of the county court of the county wherein said party qualified as administrator or executor, shall be sufficient notice to bring said administrator or executor before the court or justice issuing said process;

provided, said clerk notify said executor or administrator by United States mail.'

'That said non-resident of the state, qualifying as executor or administrator as aforesaid, shall give to the clerk of the county court of the county in which he qualifies, his address, and that a letter mailed to him at said address —unless subsequently changed and notice given to said county court clerk—shall be sufficient notice, or to the changed address, as the case may be.'

Acts 1903, p. 1344, c. 501.

At the date of the passage of this act, it appears, summarizing, that the state of the law was as follows, viz.:

That suits might be brought on the pauper oath in this state by any resident able to subscribe thereto, with the exceptions made in Shannon's Code, Section 4928, whether suing in his own right or as the administrator of a decedent, but that no non-resident, whether suing in his own right or as administrator, could so institute an action.

Now the question to be determined is whether the Act of 1903 was intended to change the law as it then stood, so as to grant to non-resident administrators or executors of the kind referred to in the act the right to sue under the pauper oath.

The act could not be held good as a technical amendatory act, because it does not comply with article 2, section 17, of the constitution, in that it does not recite the title or substance of the act to be amended; and for the same reason it could not be held valid as an act passed for the direct purpose of repealing a former act. But

it may be treated as an independent act, and so may, by implication, operate as a repeal of the former acts with which it may be inconsistent, so far as inconsistent therewith. Home Ins. Co. v. Taxing District, 4 Lea 644; Zickler v. Union Bank & Trust Co., 104 Tenn. 227, 57 S. W. 341.

Treating the act, then, as an independent statute, yet construing it in the light of the law as it then stood, what meaning should it be held to bear in respect to the special aspect of the general question now presented to us.

Looking to the language of the act, we find its terms broad and general. It is said that, 'for the purpose of suing and being sued, he (such non-resident 'executor or administrator of a person dying in or leaving assets or property in this state') shall be treated as a citizen of this state.' There is no exception as to the form, methods, agencies or privileges of suit. All are included. On what ground should the Court introduce an exception? None is perceivable. Indeed, the act, on the point in question, seems to be in entire harmony with the purpose of the Legislature, as evidenced by the Act of 1901, to confine the privilege of suing under the oath to the people of this state, or to suits devoted to their interests, since the right is not extended to non-resident administrators generally, but only to those who have qualified in this state as the personal representative of persons dying or leaving assets or property in this state. It is said in the brief of counsel for the company that the purpose of the act was merely to subject the non-resident administrator or executor the full control of our courts. That was one of the purposes, no doubt,

but not the sole purpose. He was by the act subjected not only to the control of the courts of our state, but to their protection as well, and to the use of such privileges as the law extends to litigants or prospective litigants therein."

SUMMARY.

Thus, we respectfully submit:

First. The act of the Tennessee Legislature relied upon in this case is constitutional and effective.

Second. That it has been construed by the Supreme Court of Tennessee as vesting a non-resident administrator with all of the rights, privileges, obligations and duties of a resident administrator.

Third. That under the act the administrators in these cases are to be deemed citizens of Tennessee.

Fourth. That as citizens of Tennessee acting under the authority conferred by the Tennessee courts they had no right to seek the jurisdiction of the United States Court for the Western District of Tennessee, as there was no diversity of citizenship.

Fifth. That the court had no jurisdiction, and the learned Circuit Court of Appeals in sustaining the jurisdiction was in error, and their action should be reversed.

Respectfully submitted,

LUKE E. WRIGHT,
ROANE WARING,
Counsel for Memphis Street Railway Company.

IN THE

Supreme Court of the United States

MEMPHIS STREET RAILWAY COMPANY,
Petitioner,

vs.

J. W. BOBO, Administrator of the Estate of Walter Owens, Deceased, Respondent,

AND

MEMPHIS STREET RAILWAY COMPANY,
Petitioner,

vs.

S. C. MOORE, Administrator of the Estate of Ivy B. Douglass, Deceased, Respondent.

BRIEF AND ARGUMENT FOR RESPONDENTS.

It is erroneously stated by petitioner that the Circuit Court of Appeals (Sixth Circuit) declared *Chapter* 501, *Acts of Tennessee,* 1903, unconstitutional.

The statement at pages 13 and 14 of "Brief in Support of Petition for Certiorari" that "the learned Circuit Court of Appeals * * * decided * * * that the Act of the Tennessee Legislature violated the Constitution of the United States," and the further reference, at page 15, to the action of said Court "in holding the statute in question unconstitutional" are utterly without warrant.

The Circuit Court of Appeals construed the Tennessee act, set out at page 11 of Petitioner's brief, as follows:

> "It must be assumed that the State Legislature by this statute intended to fix the status of non-resident executors and administrators as litigants in the Courts of Tennessee and did not intend to interfere with rights which are granted by the Federal Constitution and the Acts of Congress. Doubtless, the State Legislature could have denied to non-residents the right or privilege to act as executors or administrators of the estates of deceased residents of the State, *Re Mulford,* 217 Ill. 242, 1 L. R. A. (N. S.) 341 and note, but no attempt has been made so to do. On the contrary, the right of a non-resident to act as administrator of an estate in Tennessee is expressly recognized by this legislation. No attempt is made to convert an actual non-resident into a citizen of Tennessee, or to provide for the revocation of the letters of administration of a non-resident administrator in case he avails himself of his constitutional right to bring suit in the proper court of the United States."

If the above holding is correct the petition for certiorari must be denied.

In ascertaining whether the Circuit Court of Appeals properly construed the Tennessee act it is necessary, or at least helpful, to consider the state legislation on this subject, as *Chapter* 501, *Acts of* 1903, is but one of a series of Acts on the subject of suits by administrators, non-residents, etc.

It was held in 1891 (*Smith, Admr., v. Railway Co.,* 89 Tenn. 664), that no administrator could sue in *forma pauperis.*

In 1897 an act was passed (*Ch.* 133):

> "To enable personal representatives of the estates of deceased persons to prosecute suits in favor of estates represented by them upon the pauper oath."

In 1901 (*Ch.* 126) the law with respect to the prosecution of suits in *forma pauperis* was amended by the following:

> "Provided, that the provisions of this Act shall not inure to the benefit of any person who is not a citizen or resident of the State of Tennessee."

Construing the Acts of 1897 and 1901 in *pari materia* the Tennessee Court held that a non-resident, acting as administrator in Tennessee, could not prosecute a suit *in forma pauperis.*

Fawcett v. Railway Co., 113 Tenn. 246.

The state of the law then was that an administrator, if a citizen, could sue *in forma pauperis,* whereas, an administrator, if a non-resident, could not. This was obviously unjust. Though the estate was a Tennessee estate, the right to sue *in forma pauperis* depended on the citizenship of the decedent's personal representative, who might have no sort of interest in the estate.

This was remedied by *Ch.* 501, *Acts of* 1903, title to which is:

> "AN ACT to declare that for the purpose of suing and being sued, a non-resident of Tennessee, who qualifies as executor or administrator in Tennessee shall be considered a citizen of Tennessee, and to provide for the service of process upon him."

This act, which placed the estate of decedents on an equal footing, so far as "suing and being sued" was con-

cerned, without regard to the citizenship of the personal representative, is now said to deprive the Federal Court of jurisdiction it otherwise had and to deprive a citizen of another state of a right derived from the constitution and laws of the United States.

That act was passed to remove or remedy the discrimination against non-residents of Tennessee who qualify, within the state, as administrators.

In *Fawcett v. Railway Co.*, supra, the holding was:

> "A non-resident of this State, although qualified within the State as an administrator, cannot prosecute a suit in the courts of this State *in forma pauperis.*"

In the same volume of the Tennessee reports is to be found *Railway Co. v. Maxwell* (113 Tenn. 464), wherein it was held:

> "A non-resident qualified in this State as the personal representative of a person dying in or leaving assets or property in this State may prosecute a suit in this State as such personal representatives."

Explaining that the former case was decided under the law as it existed prior to 1903, the Court said of the purpose of this Act:

> "He (the non-resident, acting as administrator) was by the act subjected not only to the control of the courts of our State, but to their protection as well, and to the use of such privileges as the law extends to litigants or prospective litigants therein."

The legislature did not undertake to thereby convert a non-resident into a citizen; nor to declare that on his appointment as administrator in this state he ceased to

be a citizen of another State; nor to legislate with respect to other than state courts; nor to impair the jurisdiction of the Federal courts.

The act did not, in terms, relate or propose to affect the jurisdiction of the Federal Courts. The jurisdiction of the Federal court was not in the legislative mind. There was no attempted prohibition against a non-resident, who had qualified as an administrator in Tennessee, bringing a suit in or removing a suit to the Federal court.

It was within the power of the legislature to prohibit or permit on any terms imposed by it a non-resident from qualifying as an administrator of an estate in Tennessee but it did not do so nor attempt to do so.

The argument for the petitioner proceeds on the theory that a non-resident may not be appointed administrator in Tennessee unless he relinquish the right to go into the Federal court, whereas, there is no such requirement of the law.

It is said that such relinquishment by the two non-residents before the court are "*conditions precedent* to their right to qualify" (page 8), and, generally of a non-resident, "his compliance with this statute is a *condition precedent* to his right to qualify" (page 11); and that the statute denied "him the right to administer unless as a *condition precedent* thereto he submits to the obligations of citizenship in a qualified sense," etc. (Pages 14-15.)

Even if the definite relinquishment of the right to go into the Federal court could be read into the Act, *i. e.*, if as a "condition precedent" to appointment by the pro-

bate court the right to go into the Federal court had to be relinquished, the *jurisdiction* of the Federal court would be unimpaired. If the non-resident administrator breached the condition on which he was appointed, the sole remedy would be with the appointing power, to-wit, the probate court of Shelby county, Tennessee. Until that court acted, the letters testamentary would be outstanding and effective. It being admitted that the personal citizenship of the plaintiff, on the record, controls the question of jurisdiction and it being admitted that the plaintiff in each case is in fact a non-resident of Tennessee, the argument that as a condition precedent to the right to qualify as administrator there must be a relinquishment of the right to bring a suit in the Federal court, though an unsound proposition, leads only to the conclusion that each plaintiff breached the condition on which he was appointed and allowed to quailfy. This might justify the probate court in recalling the letters testamentary but would have no other effect.

The citizenship which determines the jurisdiction of the Federal court is that which attaches to the individual and no state law could affect that "citizenship," as the word is used in the constitution and laws of the United States.

Dred Scott v. Sandford, 19 How. 393, 404.
Slaughterhouse Cases, 16 Wall. 36.
Baldwin v. Franks, 120 U. S. 678, 690.
Boyd v. Thayer, 143 U. S. 135.
U. S. v. Wong Kim Ark, 169 U. S. 649, 678.

If the legislature had said, in so many words, that no citizen of another state, who had qualified as administrator of the estate of a citizen of Tennessee, should bring

a suit in or remove a suit against him to the Federal court, the jurisdiction of the Federal court would still have existed.

> *Harrison v. St. L. & San. R. Co.*, 232 U. S. 318.
>
> *Herndon v. C. R. I. & P. R. Co.*, 218 U. S. 135, and cases therein cited.
>
> *Madisonville Traction Co. v. Saint Bernard Min. Co.*, 196 U. S. 239: "A state cannot, by any statutory provisions, withdraw from the cognizance of the Federal courts a suit or judicial proceeding in which there is such a controversy," i. e., between citizens of different states.
>
> *Courtney v. Pradt*, 196 U. S. 89: "The right to remove given by a constitutional act of Congress cannot be taken away or abridged by state statutes," etc.
>
> *Cable v. U. S. Life Ins. Co.*, 191 U. S. 288: "No stipulation or agreement, founded on a State statute or otherwise, which the company may have entered into, could prevent the removal of the case in the exercise of its constitutional right."

The foregoing are amply sufficient to sustain the proposition stated but are not, by any means, a complete list of the cases that might be cited. Each of them involved the right of removal from a state to a Federal court, but the right to remove to, involves the right to bring a suit in the Federal court. As said in *Madisonville Traction Co. v. St. Bernard Mining Co.*, supra:

> "The rule is now settled that, under the judiciary Act of 1887, 1888, a suit cannot be removed from a state court, unless it could have been brought orig-

inally in the circuit court of the United States. *Tennessee v. Union & Planters Bank,* 152 U. S. 454; *Mexican Nat. R. R. v. Davidson,* 157 U. S. 201; *Metcalf v. Watertown,* 128 U. S. 586; *Minnesota v. Northern Securities Co.,* 194 U. S. 48."

The insistence for the defendant is that legislation providing that a non-resident, who has qualified as an administrator in Tennessee shall, in the state courts, be "*treated as a citizen*" of Tennessee, makes such non-resident a "citizen" of Tennessee within the meaning of the Acts of Congress with respect to the jurisdiction of the Federal courts. This is quite fanciful and far-fetched. That Tennessee courts *treat* a certain non-resident litigant as a citizen no more makes such non-resident a citizen of Tennessee than extending certain privileges for certain purposes to a citizen of Patagonia would result in naturalizing him.

We deem *Harrison v. St. L. and S. R. Co.,* 232 U. S. 318, conclusive of this proposition, despite the effort of petitioner's learned counsel to differentiate it.

The whole argument for petitioner is, however, based on a misconception of the Act.

The Act nowhere imposes terms on a non-resident desiring to qualify as administrator; no conditions whatever are imposed upon him insofar as relates to his appointment and qualification. The statute confers privileges on him, in his representative capacity, which are withheld from other non-residents for the very obvious reason that the property being handled and the rights being administered involve the property and rights of citizens of the State. The statute says "*that whenever a non-resident of the State of Tennessee qualifies* in the

State as the executor or administrator"—no terms are attempted to be imposed—"that for the purposes of suing and being sued, he shall be treated as a citizen of this State."

In the matter of suing or being sued in the state courts non-residents have always been treated as citizens unless certain *privileges* were expressly withheld.

Lisenbee v. Holt, 1 Sneed 42, 50.
Hilliard v. Stark, 82 Tenn. 9.

Beyond withholding certain *privileges* incident to bonds, etc., it is not perceived how Tennessee could very well treat non-residents other than as citizens when it comes to "suing and being sued."

Speaking of the "right to sue and defend in the Courts," it was well said in *Chambers v. B. and O. R. R. Co.,* 207 U. S. 142, 148:

> "It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. *Corfield v. Coryell,* 4 Wash. C. C. 371, 380, per Washington, J.; *Cole v. Cunningham,* 133 U. S. 107, 114, per Fuller, C. J.; *Blake v. McClung,* 172 U. S. 239, per Hanlan, J."

Tennessee could doubtless deny to a non-resident the right to qualify or be appointed as an executor or administrator. (*Clarke v. Mathewson,* 12 Pet. 164, 12 U. S. 674), but the State has never undertaken to exercise the right, but on the contrary has expressly recognized the propriety of issuing letters testamentary to non-resi-

dents. By reason of the laws of the state withholding from non-resident litigants the right to sue *in forma pauperis* in the state courts, it developed that citizens of Tennessee, interested in a decedent's estate, were denied certain rights solely because of the non-residence of the personal representative. Hence, "for the purpose of suing and being sued," the non-resident personal representative of a decedent was to "be *treated as a citizen*" of the state, thus placing all personal representatives on equality, insofar as litigating in any of the state courts was concerned.

The petitioner seems to think that the question is in some way determined by *Southern Ry. Co. v. Maxwell*, 113 Tenn. 464. The court there stated what was to be determined:

> "The question made upon this act in the present case is whether a non-resident administrator of the estate of a person dying in this State, or leaving assets or property in this State, can prosecute a suit in this state on the pauper oath."

Answering the question in the affirmative, the Court concluded, very properly, that the Act was intended to give non-residents qualifying as executors or administrators in the state "the use of such privileges as the law extends to litigants or prospective litigants" in "*the Courts of our State.*"

The following propositions, somewhat in the nature of a resume, are believed to be undeniably sound:

1. Letters testamentary being issued, the petitioner cannot, in an action of this nature, inquire into the propriety or validity of such letters.

Railway Co. v. Mahoney, 89 Tenn. 311, 318.
Franklin v. Franklin, 91 Tenn. 119, 129.
Gallatin Turnpike Co. v. Puryear, 116 Tenn. 122.
Dayton Coal & Iron Co. v. Dodd, 188 Fed. 597, 37 L. R. A. (N. S.) 465 (6th Circuit).
Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 243.

2. Whether one is a "citizen" of a certain state, as that word is used in the Constitution and laws of the United States, is independent of state control.

Boyd v. Thayer, 143 U. S. 135.
Slaughter House Cases, 16 Wall. 36.
U. S. v. Wong Kim Ark, 169 U. S. 649, 678.
Baldwin v. Franks, 120 U. S. 678, 690.

3. It is not within the power of one state to deprive a citizen of another state of the right to go into the Federal court.

Harrison v. St. L. & San. R. Co., 232 U. S. 318.
Herndon v. C. R. I. & P. R. Co., 218 U. S. 135.
Madisonville Traction Co. v. Saint Bernard Min. Co., 196 U. S. 239.
Courtney v. Pradt, 196 U. S. 89.
Cable v. U. S. Life Ins. Co., 191 U. S. 288.

4. The legislation in Tennessee with respect to non-resident administrators was simply to give non-residents the same rights as residents, in the State Courts.

Ch. 133, *Acts of* 1897.
Smith, Admr., v. Railway Co., 89 Tenn. 664.
Ch. 126, *Acts of* 1901.
Fawcett v. Railway Co., 113 Tenn. 246.
Ch. 501, *Acts of* 1903.
Railway Co. v. Maxwell, 113 Tenn. 464.

5. Non-residents have the same rights as citizens in the courts of the State.

Lisenbee v. Holt, 1 Sneed 42, 50.
Hilliard v. Stark, 82 Tenn. 9.
Chambers v. B. & O. R. R. Co., 207 U. S. 142.

6. It is not within the power of a State, by legislative enactment, to confer upon its own courts exclusive jurisdiction of proceedings involving the estates of deceased persons, excluding the jurisdiction of the courts of the United States, in cases where the constitutional requirement as to citizenship is met.

Hess v. Reynolds, 113 U. S. 73.
Clark v. Bever, 139 U. S. 96.

It is plain, on a consideration of the Act of 1903, and the end to be thereby accomplished that the legislative mind was not so much as addressed to the question of afflicting the jurisdiction of the Courts of the United States and if such had been the purpose of the Tennessee legislature, it could not have accomplished it.

Respectfully submitted,

CARUTHERS EWING,
Attorney for Respondent Bobo.

ANDERSON & CRABTREE,
Attorneys for Respondent Moore.

Nos. 622
623

IN THE

Supreme Court of the United States

MEMPHIS STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. W. BOBO, ADMINISTRATOR,
Defendant in Error,

And

MEMPHIS STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

S. C. MOORE, ADMINISTRATOR,
Defendant in Error.

MOTION TO TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

CARUTHERS EWING,
For J. W. Bobo, Administrator.
MILTON J. ANDERSON,
IKE W. CRABTREE,
For S. C. Moore, Administrator.

S. C. TOOF & CO., PRINTERS, MEMPHIS

IN THE

Supreme Court of the United States

MEMPHIS STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

J. W. BOBO, ADMINISTRATOR,
Defendant in Error,

And

MEMPHIS STREET RAILWAY COMPANY,
Plaintiff in Error,

vs.

S. C. MOORE, ADMINISTRATOR,
Defendant in Error.

MOTION TO TRANSFER FOR HEARING TO THE SUMMARY DOCKET.

Now comes J. W. Bobo, Administrator of the estate of Walter Owens, deceased, and S. C. Moore, Administrator of the estate of Ivy B. Douglass, deceased, being defendants in error in the above entitled causes, and move this Court that the above entitled causes be trans-

ferred for hearing to the Summary Docket of this Court because they are of such character as not to justify extended argument.

CARUTHERS EWING,
Attorney for J. W. Bobo, Administrator.
MILTON J. ANDERSON,
IKE W. CRABTREE,
Attorneys for S. C. Moore, Administrator.

NOTICE OF MOTION.

The Memphis Street Railway Company, Plaintiff in Error, is hereby notified that on November 20th, 1916, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, the defendants in error in the above entitled causes will submit for consideration of said Court the foregoing motion and brief in support thereof, hereto attached, of which fact you are now advised.

CARUTHERS EWING,
Attorney for J. W. Bobo, Administrator.
MILTON J. ANDERSON,
IKE W. CRABTREE,
Attorneys for S. C. Moore, Administrator.

Service of motion, as above, accepted this October 28th, 1916.

LUKE E. WRIGHT,
ROANE WARING,
Attorneys of Record for Plaintiff in Error.

STATEMENT OF CASE AND BRIEF IN SUPPORT OF MOTION.

Each of these causes was instituted in the District Court of the United States for the Western Division of the Western District of Tennessee; the plaintiff below, in each cause, was a non-resident of the State of Tennessee, duly qualified as administrator of the estate of decedents, who were citizens of Tennessee at the time they died; the defendant below, in each cause, was a citizen of Tennessee, residing in the District wherein suit was brought.

In each cause judgment was rendered in favor of the plaintiff, which judgment was, on the 6th day of June, 1916, affirmed by the Circuit Court of Appeals, Sixth Circuit, to which Court the causes were carried by the defendant below—petitioner here.

The defendant below, (Memphis Street Railway Company), filed in this Court a Petition for Certiorari and in the Brief in support of said Petition stated:

> "The sole and only question raised by the petition for certiorari in these cases is whether or not in law there was a diversity of citizenship between the petitioner, Memphis Street Railway Company, who was the defendant below, and the respondents, the administrators, who were the plaintiffs below."

This Honorable Court granted the petition on the 16th day of October, 1916, and these causes are accordingly now here pending.

The only question to be determined by this Court is whether *Ch.* 501, *Acts of Tennessee,* 1903, defeats and destroys the jurisdiction of the United States Court for the Western District of Tennessee.

Said statute is as follows:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, That whenever a non-resident of the State of Tennessee qualifies in this State as the executor or administrator of a person dying in or leaving assets or property in this State, that for the purposes of suing and being sued, he shall be treated as a citizen of this State, and in case it is desired by any citizen of this State to sue said administrator or executor in his official capacity for any debt or demand, due or owing to any citizen of this State, from his testator or intestate, that, in case of the inability of the officer in whose hands process is placed, to find said administrator or executor in this State, that notice of said suit, served upon the Clerk of the County Court of the county wherein said party qualified as administrator or executor, shall be sufficient notice to bring said administrator or executor before the court or justice issuing said process; Provided said clerk notify said executor or administrator of such notice served upon him by the United States mail.
>
> Sec. 2. Be it further enacted, That said non-resident of the State, qualifying as executor or admin-

istrator as aforesaid, shall give to the Clerk of the County Court of the county in which he qualifies, his address, and that a letter mailed to him at said address—unless subsequently changed and notice given to said County Court Clerk—shall be sufficient notice, or to the changed address, as the case may be.''

The petitioner here, (defendant below), concedes ''that upon questions of diversity of citizenship, the citizenship of the administrator or executor, rather than the citizenship of the deceased, governs in determining whether or not there is a diversity of citizenship.''

Petition for Certiorari & Brief, p. 8.

The sole and only question to be argued before and determined by this Court is whether ''when a non-resident qualifies as the administrator of the (an) estate in Tennessee, he, for the purpose of suing and being sued, becomes a citizen of Tennessee.''

Petition for Certiorari & Brief, p. 10.

The only question, therefore, to be here argued and determined is the question of the jurisdiction of the Court below as affected by the Tennessee statute, *supra*.

The case is clearly of such a character as not to justify extended argument—only one proposition of law being involved—and a speedy determination of the question will quite obviously subserve the ends of justice in these particular causes as well as the ends of public justice.

Since the petition for certiorari was granted in these causes the question of the jurisdiction of all Courts of the United States in Tennessee over causes wherein the plaintiff is a non-resident acting as administrator of the estate of a deceased person, who at the time of death was a citizen of Tennessee, has been left in doubt.

Until this question is set at rest in these causes, (in view of the grant of the petition for certiorari), no non-resident who has qualified as executor or administrator, in Tennessee, of the estate of a citizen of Tennessee, knows whether the Courts of the United Stats are open to him.

The District Courts of the United States are in doubt as to whether they have jurisdiction of causes wherein a non-resident of Tennessee, acting as executor or administrator of a Tennessee estate, has appealed or is appealing to such Courts.

The Circuit Court of Appeals, Sixth Circuit, cannot know until the question is settled in these causes, where an executor or administrator similarly situated as the respondents in these causes is plaintiff, whether jurisdiction exists.

The suspension of the settlement of the question operates to the prejudice of (1) every non-resident, in petitioners' situation, who have a suit pending and (2) every non-resident, similarly situated, who desires to go into the Courts of the United States in Tennessee.

All of this is true, also, in every State having a statute similar to the Tennessee statute.

It is easy for this Court to see that valuable rights are jeopardized or imperiled until the question is set at rest.

A jurisdictional question, such as is here involved, does not have to be primarily raised. It does not relate to venue.

In re Moore, 209 U. S. 490.
Western Loan Co. v. *B. & B. Mining Co.,* 210 U. S. 368.
Creigh v. *Westinghouse, etc., Co.,* 214 U. S. 249.
Memphis Sav. Bank v. *Houchens,* 115 Fed. 96.

The policy of the Court is to speedily settle causes "wherein the only question in issue is the question of the jurisdiction of the Court below."

Rule 32, *page* 36.

The necessity for so doing is apparent.

A non-resident of a state having, ordinarily, the right to propound his action in the Courts of the United States is entitled to know, without delay, whether he may go into said Courts and be heard.

A non-resident of a State, having gone into a Court of the United States, is entitled to know, without delay, whether his cause of action is pending in a Court which has jurisdiction of it.

It can be easily seen that his cause of action might be barred by the statute of limitations because or by virtue of the loss of that time within which he could elsewhere or otherwise sue.

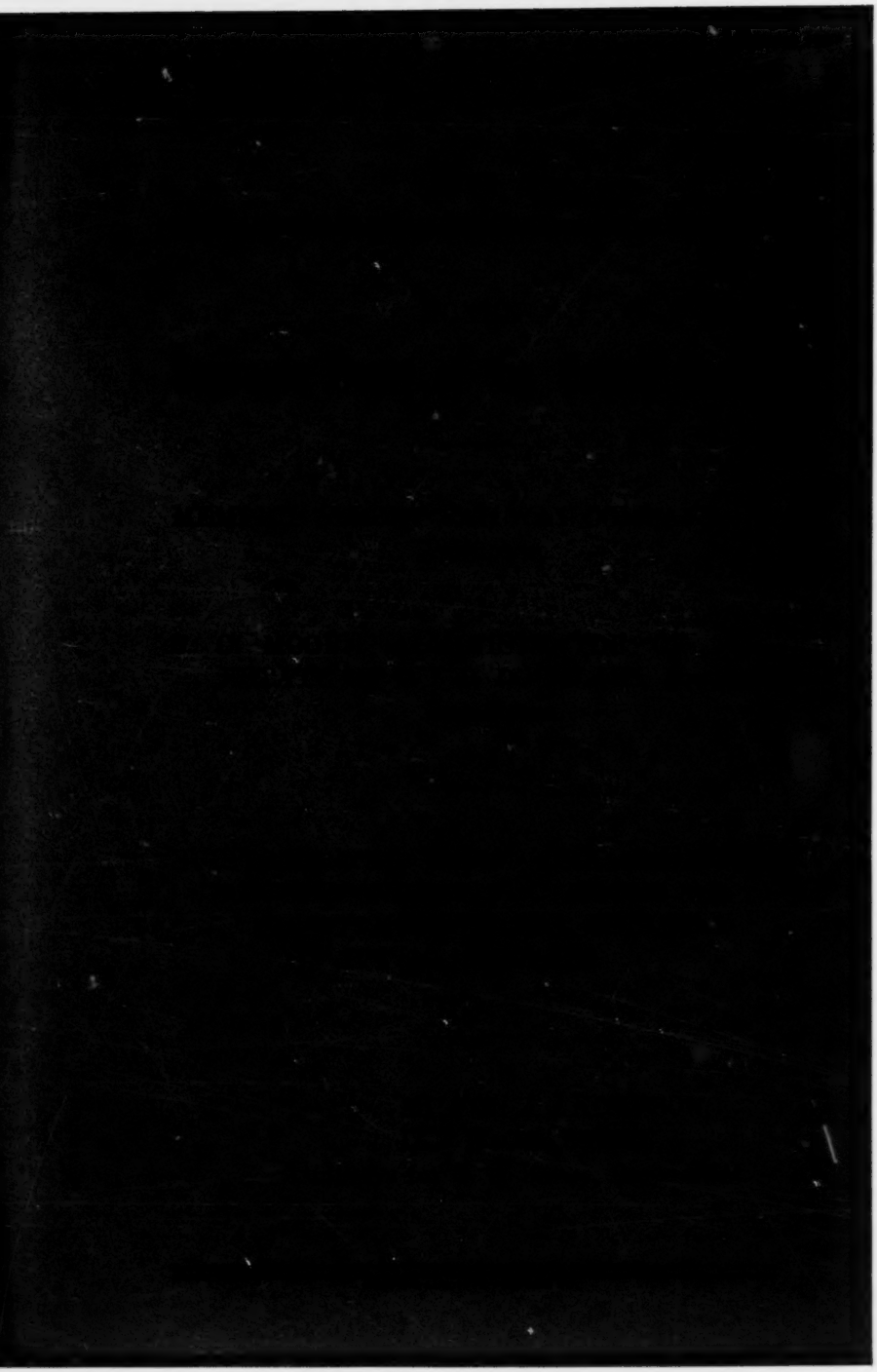
These considerations, coupled with the fact that no extended argument would be justified by the one question presented, require or at least justify the placing of these causes on the Summary Docket to the end that they may be speedily heard and determined.

Respectfully submitted,

CARUTHERS EWING,
For J. W. Bobo, Administrator.

MILTON J. ANDERSON,

IKE W. CRABTREE,
For S. C. Moore, Administrator.



IN THE

Supreme Court of the United States

MEMPHIS STREET RAILWAY COMPANY,
Petitioner,

vs.

S. C. MOORE, ADMINISTRATOR OF THE ESTATE OF IVY B. DOUGLASS, Deceased,
Respondent.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR RESPONDENT, S. C. MOORE, ADMINISTRATOR OF THE ESTATE OF IVY B. DOUGLASS.

Supplementing our brief filed as a reply to the Petition for Certiorari, we submit:

The Circuit Court of Appeals was concerned, as this Court necessarily will be, with the construction and not the destruction of Chapter 501 Acts of Tennessee, 1903.

Learned counsel for Petitioner erroneously assume that the Circuit Court of Appeals held the Tennessee act unconstitutional and void on the ground that the Act impairs the jurisdiction of the Federal Court.

What the Circuit Court of Appeals did was to

construe the Act as meaning and intending to fix the status of non-resident executors and administrators as litigants in the Courts of Tennessee, and as not intending to interfere with rights which are granted and guaranteed by the Federal Constitution and Acts of Congress.

See opinion of Circuit Court of Appeals, 232 Fed. Rep. p. 710.

The Act, in general language, will be limited in construction to what was within the constitutional power of the State to enact.

It is within the constitutional power of a State to prohibit non-resident citizens from qualifying as administrators, or to permit them to qualify and act as such under such terms, conditions and limitations as do not deprive them of their constitutional rights; to fix their status in the Courts of the State, and, extend to them in its Courts only, the privileges and rights extended under its laws to residents and citizens.

But it is not competent for a State to arbitrarily change the citizenship of a resident and citizen of another State, and thus deprive him of his rights as a citizen of the United States and of the State in which he resides.

Dred Scott v. Sanford, 19 Howard 393-404.
Slaughter House Cases, 16 Wall. 36.
Boyd v. Nebraska, 143 U. S. 135.
Harrison v. St. L. & S. F. R. R. Co., 232 U. S. 318.

Citizenship of the United States and of the respective States is now fixed by the Fourteenth

Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

A State has no authority or power in the matter of changing the attributes of citizenship. It may grant to an alien or to citizens of other States the same rights and privileges it accords its own citizens; but it cannot invest the alien with the rights and privileges secured to its citizens under the Federal government; nor can it deprive citizens of other States of those rights. In the Dred Scott case, before the amendment, but repeatedly since approved and especially quoted in Boyd v. Nebraska, 143 U. S. 109, it was said:

"The constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this Court to be so. Consequently no State, since the adoption of the Constitution, can by naturalizing an alien invest him with the rights and privileges secured to a citizen of a State under the Federal government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the constitution and laws of the State attached to that character."

It is argued by learned counsel for Petitioner, pages 10 and 11 of printed petition and brief, that the Act of 1903 copied in full on page 11 of their

brief, was a restriction attached to the appointment of a non-resident, making him a citizen of Tennessee and requiring "his" compliance with this statute as a condition precedent to his right to qualify.

On the contrary, the act recognizes the right of a non-resident to qualify, and provides that in the matter of suing and being sued he shall have the same treatment in its courts accorded its own citizens.

The first and second clauses, the *only* enacting parts of the act touching *residence* and *citizenship*, read: "Be it enacted, etc., that whenever a non-resident of the State of Tennessee qualifies in this State as executor or administrator of a person dying or leaving assets or property in this State, that for the purpose of suing and being sued he shall be treated as a citizen of the State." This is first a recognition of the right, which has existed for all time in the State, of a non-resident to qualify as administrator; and second, according to him the same treatment as a litigant—treated as—as is accorded a citizen of the State in her courts.

In ascertaining whether the Circuit Court of Appeals properly construed the Tennessee act it is necessary, or at least helpful, to consider the State legislation on this subject, as *Chapter* 501, *Acts of* 1903, is but one of a series of Acts on the subject of suits by administrators, non-residents, etc.

It was held in 1891 (*Smith, Admr., v. Railway Co.*, 89 Tenn. 664) that no administrator could sue in *forma pauperis*.

In 1897 an act was passed (*Ch.* 133):

> "To enable personal representatives of the estates of deceased persons to prosecute suits in favor of estates represented by them upon the pauper oath."

In 1901 (*Ch.* 126) the law with respect to the prosecution of suits in *forma pauperis* was amended by the following:

> "Provided, that the provisions of this Act shall not inure to the benefit of any person who is not a citizen or resident of the State of Tennessee."

Construing the Acts of 1897 and 1901 in *pari materia* the Tennessee Court held that a non-resident, acting as administrator in Tennessee, could not prosecute a suit in *forma pauperis.*

Fawcett v. Railway Co., 113 Tenn. 246.

The state of the law then was that an administrator, if a citizen, could sue in *forma pauperis,* whereas, an administrator, if a non-resident, could not. This was obviously unjust. Though the estate was a Tennessee estate, the right to sue in *forma pauperis* depended on the citizenship of the decedent's personal representative, who might have no sort of interest in the estate.

This was remedied by *Ch.* 501, *Acts* of 1903, which was construed in the light of the other preceding statutes by the Supreme Court of Tennessee in the case of *Railway Co. v. Maxwell,* 113 Tenn. 466.

The following from the opinion shows the view

taken of the act by the Supreme Court of the State adopting it:

> "The first assignment necessitates a construction of Chapter 501, page 1344, of the Acts of 1903.
>
> The question made upon this act in the present case is whether a non-resident administrator of the estate of a person dying in this State, or leaving assets or property in this State, and appointed by the courts of this State, can prosecute a suit in this State on the pauper oath. The defendant in error is a citizen of the State of Virginia, but qualified as administrator here, and brought the present suit upon the pauper oath. In the court below, a motion was made to dismiss the suit on this ground, or for want of a prosecution bond, which motion was overruled by the court. To test the correctness of this ruling, the first assignment of error was filed.
>
> In order to a proper understanding of this matter, it will be necessary to make a short review of previous legislation on the subject."

The Court then reviews all the legislation of the State on the subject and the decisions of the Court touching same, and follows the review with this statement:

> "Now, the question to be determined is whether the act of 1903 was intended to change the law as it then stood, so as to grant to non-resident administrators or executors of the kind referred to in the act the right to sue upon the pauper oath."

And answering the question, the Court continues:

> "Looking to the language of the act, we find its terms broad and general. It is said that, 'for

> the purposes of suing and being sued, he (such non-resident executor or administrator of a person dying in or leaving assets or property in this State) shall be treated as a citizen of this State.' There is no exception as to the form, methods, agencies or privileges of suit. All are included. On what ground should the court introduce an exception? None is perceivable. Indeed, the act, on the point in question, seems to be in entire harmony with the purpose of the legislature, as evidenced by the act of 1901, to confine the privilege of suing under the oath to the people of this State, or to suits devoted to their interests, since the right is not extended to non-resident administrators generally, but only to those who have qualified in this State as the personal representative of persons dying or leaving assets or property in this State. It is said in the brief of counsel for the company that the purpose of the act was merely to subject the non-resident administrator or executor to the full control of our courts. That was one of the purposes, no doubt, but not the sole purpose. He was by the act subjected not only to the control of the courts of our State, but to their protection as well, and to the use of such privileges as the law extends to litigants or prospective litigants therein."

So we submit that there is no languge or intent in the act itself, nor in the language of the Court construing the act to limit, restrict or deprive a non-resident administrator of his Federal right.

A State has the same power of control in the matter of granting letters of administration to citizens of other States that it has in the matter of licensing or permitting corporations organized in, and citizens of other States to carry on an intrastate business

within her borders. The right to qualify as administrator in the one instance and to do business in the other is implied, when not expressly prohibited or restricted by statute.

Under the authority of the majority opinion of this Court in Insurance Co. v. Prewitt, 202 U. S. 246, it would be competent for a State to enact a law to the effect that when a non-resident citizen qualified and acting as administrator within the State instituted a suit in or removed a cause between him and a citizen of the State to the Federal Courts, he would forfeit his right to act and his letters of administration should be revoked. But that is neither the language nor the effect of the Tennessee act.

A non-resident citizen can or cannot act as administrator, just as a foreign corporation may or may not do business. And when a non-resident is permitted to qualify as administrator, or a foreign corporation is licensed to carry on business, the citizenship of the person or corporation, with all its consequent constitutional rights, remains.

It is conceded by counsel for petitioner that the personal citizenship of the administrator controls the jurisdiction, and that the requisite diversity of citizenship exists in the case at bar, unless the act of the Tennessee Legislature is effective in changing the citizenship of the administrator from Arkansas to Tennessee.

To give the act the effect insisted upon by learned counsel for petitioner, namely, to make the administrator a citizen of Tennessee, would make it mean by its provisions that no citizen of another State

could act in the State as administrator, and that when a non-resident citizen qualifies as such he thereby becomes a citizen of the State. Of course, this is not the language nor the meaning of the language of the Tennessee act, but if it were, we yet have an idea, stupid though it may be, that citizenship is fixed by the constitution of the United States, and that it is not a thing a State may confer or withhold at its whimsical pleasure, so as to deprive a citizen of the United States of his rights as such.

We assume that learned counsel for Petitioner will press the proposition stated on page 11 of their printed brief, that compliance with the statute is a condition precedent to a non-resident's right to qualify as administrator. The statute provides for no prerequisite requirements. It simply provides that when he qualifies, etc. Of course, he qualifies only when the necessity or occasion arises.

If it be asserted that a non-resident citizen who desires to qualify as an administrator in Tennessee, must by agreement assume the status of a citizen of the State, which carries with it the implied agreement not to sue in or to remove suits to the Federal Court if such an agreement is to be read into the act, and such is necessary to sustain the position of learned counsel for Petitioner, then the act would be unconstitutional and void.

Cable v. U. S. Life Insurance Co., 191 U. S. 288.

Security Mutual Life Insurance Co. v. Prewett, 202 U. S. 246.

Southern Tea Company v. Denton, 146 U. S. 202.

Baron v. Burnside, 121 U. S. 200.

Home Insurance Company v. Moss, 20 Wall. 445.

Martin v. Baltimore & O. R. Company, 151 U. S. 673.

The act, purporting only to fix the status of non-resident executors and administrators as litigants in the Courts of Tennessee, if it is to be given effect in depriving the non-resident administrator of his Federal right to sue and remove suits to the Federal Court, must have read into it or be so construed as to carry provisions identical with the Oklahoma act dealt with in the case of Harrison v. St. Louis & San Francisco Railroad Company, 232 U. S. 318.

The Oklahoma act, as it is attempted by learned counsel to construe the Tennessee act, created, first, a compulsory fictitious citizenship; and second, having created said fictitious status, provided that said status should not be challenged by the assertion of any other domicile or citizenship on penalty of having license to transact business revoked. That the corporation affected by that act was engaged in interstate commerce only aggravated the viciousness of the legislation.

The following, from the opinion of Mr. Chief Justice White in the Harrison case is illustrative of the viciousness of this sort of legislation:

> "While the provisions of the statute are dependent one upon the other, and are unified in the sense that they are all components of a

common purpose, that is, tend to the realization of one and the same legislative intent, its provisions, nevertheless, for the purpose of analysis, are plainly two-fold in character; that is, one, the compulsory citizenship and domicile within the State which the first section imposes, and the other, the prohibition which the statute pronounces against any assertion in a court of the existence of any other citizenship and domicile than that which the statute ordains, and the means and penalties provided for sanctioning such prohibition. Although theoretically, the first would seem to be the more primary and fundamental of the two, since the second, after all, consists but of methods provided for making the first operative, the second, from the point of view we are examining, is the primal consideration, since it directly deals with the assertion in a State court of a right to remove, and provides the mechanism which was deemed to be effectual to render the assertion of such right impossible. In other words, the difference between its two provisions is that which exists between an attempt on the one hand to render the enjoyment of a Federal right impossible by arbitrarily creating a fictitious legal status incompatible with the existence of the right, and on the other hand the formulation of such prohibitions and the establishment of such penalties against the attempt to avail of the Federal right as to cause it to be impossible to assert it. Coming, then, to consider the status from the second or latter point of view, we think it is clear that it plainly and obviously forbids a resort to the Federal courts on the ground if diversity of citizenship in the contingency contemplated, punishes by extraordinary penalties any assertion of a right to remove under the laws of the United States, and

attempts to divest the Federal courts of their power to determine, if issue arises on the subject, whether there is a right to remove. Indeed, the statute goes much further, since, when an application to remove is made, in order to prevent a judicial consideration of its merits even by the State court, it in effect commands the judge of such court, on the making of the application, to refuse the same, and to certify the fact that it was made to a State executive officer to the end that such officer should, without judicial action, strip the petitioning corporation of its right to do business, besides subjecting it to penalties of the most destructive character as a means of compelling acquiescence. When the nature of the statute is thus properly appreciated, nothing need be further said to manifest its repugnancy to the Constitution, or to demonstrate the correctness of the decree of the Court below."

We again submit that if the act carried a positive prohibition against the institution of suits in or removal of suits to the Federal Court, then it would not deprive the Federal court of its jurisdiction. Such a prohibition might be followed with the penalty of having the Letters of Administration or commission revoked, but even that provision would not oust the Federal court of its jurisdiction until such revocation was had in the State courts, and pleaded as a bar to the action in the Federal court.

Cable v. U. S. Life Insurance Co., 191 U. S. 288.

In the Cable case, the statute of Illinois preventing the removal of causes by foreign insurance com-

panies, on penalty of a revocation of the company's license to do business in that State, was discussed, touching which Mr. Justice Peckham, delivering the opinion of the Court, said:

> "One thing is entirely clear; that the company could have removed this case from the State to the Federal court, notwithstanding the State statute or anything contained in its application for a license to do business within the State. Upon removal the company would have the full and adequate defense, under the law as administered by the Federal courts, that it would have in the equity case. Whether, as a result of such removal, the State would have the right by reason of the statute to revoke the license given to the company, is not a question which it is necessary for us to here discuss or determine."

CONCLUSION.

In conclusion, we submit:

First: That the Tennessee act recognizes the right without prerequisite requirements of any sort, of a non-resident citizen to qualify as administrator; and, it does not attempt to regulate his status in any jurisdiction except the courts of Tennessee; it does not deprive or pretend to deprive such non-resident of his Federal right under the constitution and laws of the United States; but that it simply accords him, as a litigant in the State courts, the same treatment that it accords its own citizens; and that it was within the power of the Tennessee Legislature to enact legislation of such scope.

Second: That the act does not purport to change the citizenship of a non-resident who is appointed administrator in the State, nor does it attempt to set up for him an arbitrary status which would affect the jurisdiction of the Federal courts; or deprive him of his Federal right; and that if it did in specific language so provide, it would be ineffective.

Third: And, therefore, the opinion of the Circuit Court of Appeals should be by this Honorable Court affirmed.

Respectfully submitted,

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